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No. 15

In the Supreme Court of the United States

OCTOBER TERM, 1957

Public Service Commission of Utah and Utah Citizens Rate Association,

Appellants,

v.

United States of America and Interstate Commerce Commission,
The Denver and Rio Grande Western Railroad Company,
Union Pacific Railroad Company,
Southern Pacific Company,
The Western Pacific Railroad Company,
Utah Railway Company,
Bamberger Railroad Company,
Tooele Valley Railway Company,
Salt Lake, Garfield and Western Railway Company,
The Ogden Union Railway and Depot Company,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

BRIEF OF RAILROAD APPELLEES

ELMER B. COLLINS,
Counsel of Record for Railroad Appellees,
1416 Dodge Street,
Omaha, Nebraska.
BRYAN P. LEVERICH,
ERNEST P. PORTER,
ALBERT R. BOWEN,
PETER W. BILLINGS,
WOOD R. WORSLEY,
S. N. CORNWALL,
A. U. MINER,
Attorneys for Railroad Appellees.

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Appendix B—Cases in which the Commission authorized interstate rate increases and the companion cases in which the Commission felt compelled to exert its authority over Utah intrastate rates.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

BRIEF OF RAILROAD APPELLEES

OPINIONS BELOW

The majority opinion and dissenting opinion of the three-judge United States District Court for the District of Utah (R. 39-65) are reported in 146 F. Supp. 803. The court's findings of fact and conclusions of law are in the Record at pages 65-72. The report of the Interstate Commerce Commission (R. 94-120) appears in 297 I. C. C. 87.

JURISDICTION

This action was brought by the above-named appellants pursuant to 28 U. S. Code 1336, 1398, 2284 and 2321-2325, to enjoin, annul and set aside the order issued February 8, 1956 (R. 130), by the Interstate Commerce Commission in a proceeding entitled "No. 31484, Utah Intrastate Freight Rates and Charges." That order increased certain intrastate rates on freight moved by the railroad appellees within the State of Utah. Petition for reconsideration was denied by the Commission January 9, 1956.

Final judgment and decree (dated June 13, 1956) of the district court sustaining the validity of the order and dismissing the complaint was entered June 18, 1956 (R. 73-75). Jurisdiction of this Court is conferred by 28 U. S. Code 1253, 2101(b) and 2325. Probable jurisdiction was noted on November 5, 1956, 77 S. Ct. 128.

STATUTE INVOLVED

The National Transportation Policy and pertinent provisions of Sections 13 and 15a of the Interstate Commerce Act, Part I, 49 U. S. C., are set out verbatim in Appendix A hereto.

QUESTIONS PRESENTED

The questions presented, as stated in appellants' Jurisdictional Statement, page 3, are as follows:

"(1) Were the findings of the Interstate Commerce Commission challenged in the above entitled case supported by substantial evidence?

"(2) May the court sustain the Interstate Commerce Commission's Order, without further evidence on the following:

(a) The presumption that interstate and intrastate rates were in proper relationship prior to the increase;

(b) The matter of common knowledge that intrastate and interstate traffic are intermingled on the same trains.

"(3) May the Interstate Commerce Commission and the Court ignore the evidence of the protestants which detracts from the evidence of the railroads.

"(4) May a collateral attack be made in this action upon the Interstate Commerce Commission Order in Ex Parte No. 175."

It is observed that either an affirmative or a negative answer to question "(1)" will necessarily dispose of and render entirely superfluous question "(2)(a)" and "(b)."

It is noted also that the word "collateral" has been eliminated from question "(4)" as restated in appellants' brief, page 5. At page 37 of their brief appellants insist they are entitled in this case to attack the "legality" of the Interstate Commerce Commission's order in Ex Parte No. 175, while denying at page 36 that this is a "collateral attack" on that order.

STATEMENT

This is a direct appeal by the Public Service Commission of Utah (hereinafter called "Utah commission") and Utah Citizens Rate Association (hereinafter called "Rate Association"), from a decision and final decree (one judge dissenting) of a three-judge United States District Court for the District of Utah, sustaining the validity of the order issued by the Interstate Commerce Commission (hereinafter called "Commission") Feb-

rnary 8, 1956, under Section 13(4) of the Interstate Commerce Act, in a proceeding entitled "No. 31484, Utah Intrastate Freight Rates and Charges." The order (R. 130) directed the railroads operating in Utah to increase by 15 percent their intrastate freight rates on commodities, with certain exceptions, moved by them within Utah.

PROCEEDING BEFORE THE COMMISSION

The circumstances which led to the issuance of the order are stated as follows in the Commission's report of October 17, 1955, upon which the order is based (R. 95-97):

> "Exceptions to the report proposed by the examiner were filed by the Public Service Commission of Utah, the Utah Citizens Rate Association, the Utah Coal Operators Association, and the Ideal Cement Company, and the respondents replied. The parties were heard in oral argument Exceptions and requested findings not discussed in this report nor reflected in our findings or conclusions have been considered and found not justified.
>
> "This proceeding is an investigation under section 13 of the Interstate Commerce Act into the lawfulness of Utah intrastate freight rates and charges. Responsive to a petition filed by the principal railroads serving Utah, we entered upon this investigation for the purpose of determining whether the rates and charges of the common carriers by railroad operating in Utah, or any of them, for the intrastate transportation of property, made or imposed by authority of the State of Utah, cause any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce, on the one hand, and interstate or foreign commerce, on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, and, if so, what rates and charges, or what

maximum or minimum, or maximum and minimum, rates and charges shall be prescribed to remove any unlawfulness found to exist.

"All common carriers by railroad operating in Utah which are subject to the Commission's jurisdiction were made respondents. Copies of the order of investigation and notice of hearing were served upon each of them and upon the State of Utah.

"In *Increased Freight Rates, 1951,* 280 I. C. C. 179, decided March 12, 1951, hereinafter referred to as Ex Parte No. 175, we authorized interim general increases, among others, of 2 percent in all basic interstate rates and charges, with a few exceptions, in western territory within which the State of Utah is located, subject to maximum increases on certain commodities. Such increase became effective generally on April 4, 1951, on interstate traffic. In the second Ex Parte No. 175 proceeding, 281 I. C. C. 557, decided August 2, 1951, the respondents were authorized to increase such interstate rates and charges 6 percent in lieu of the amount previously authorized, such increase to be applied as a surcharge to the amount of the total freight charge shown on the freight bill. This increase became effective generally on August 28, 1951, on interstate traffic, and was subject to an expiration date of February 28, 1953. In the third Ex Parte No. 175 proceeding, 284 I. C. C. 589, decided April 11, 1952, the surcharge previously authorized was increased to 15 percent, subject also to certain exceptions in which lesser percentages were authorized on certain commodities, and subject also to certain maximum increases, with an expiration date of February 28, 1954. The expiration date has been extended to December 31, 1955, by order entered July 29, 1953, 289 I. C. C. 395. The latter increases became effective generally on interstate traffic on May 2, 1952.

"By petitions filed in June, 1951, November, 1952, and September, 1953, the respondents requested

the Utah Commission to authorize increases in the intrastate rates and charges corresponding to those authorized in the three Ex Parte No. 175 proceedings. Hearings were held on these petitions in October, 1951 and November and December, 1953. By order of December 14, 1953, the Utah commission dismissed the petitions on the ground that the railroads had failed to produce evidence concerning their intrastate operations as required by Utah law. None of the increases authorized in the various Ex Parte No. 175 proceedings has been made applicable on intrastate traffic. The respondents now seek to make the final Ex Parte No. 175 increases (15 percent, subject to the stated exceptions and maxima) in all intrastate rates and charges, except those applying on sugar beets and beet-sugar final molasses moving to sugar factories."

After a thorough and detailed review of the evidence submitted by the railroads, the appellants and other parties, the Commission's report sets forth the following (R. 117-120)—

"*Discussion and conclusions.*—This proceeding presents two main questions for determination. First, do the present intrastate rates and charges cause any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce, on the one hand, and interstate commerce, on the other hand; and second, do the present intrastate rates and charges cause any undue, unreasonable, or unjust discrimination against interstate commerce? In considering the first question, it should be noted that this provision of section 13(4) of the act is primarily for the protection of persons and localities and not for the benefit of the carriers. Only one interstate shipper of cement presented evidence purporting to show undue and unreasonable advantage and prejudice between persons and localities. That evidence is not sufficient to support the statewide finding requested.

"There remains the question of unlawful discrimination against interstate commerce. As noted, the respondents estimate that their annual revenues will be increased by approximately $1,880,000 if the Ex Parte No. 175 increases are added to the present intrastate rates. About 80 percent of that amount, it is estimated, would come from the intrastate movement of products of mines. This would leave some 20 percent, or $376,000, to be borne by other commodities.

"The record is convincing that the transportation conditions affecting Utah intrastate traffic differ in no material respect from those affecting interstate traffic to and from that State, and that Utah intrastate traffic is no less able to bear the full increase sought than the interstate traffic. The Ex Parte No. 175 increases were authorized for interstate rail traffic throughout the country based upon the total revenue needs of the railroads generally, and have been made effective on interstate traffic generally as well as on intrastate traffic with most of the States. The railroads' need for additional revenue to meet increased operating expenses was the underlying basis for our decision in that proceeding. Those increased operating costs were not confined to interstate traffic, but were and are incurred also on Utah intrastate traffic.

"We conclude that—

"1. The conditions incident to the intrastate transportation of freight in Utah are not more favorable than those incident to the interstate transportation between Utah and adjoining States.

"2. The amounts and percentages by which interstate freight rates and charges between points in Utah and points in other States were increased, as authorized in Ex Parte No. 175, are just and reasonable.

"3. The present Utah intrastate rates and charges on carload and less-than-carload freight, except on sugar beets and beet-sugar final molasses destined to sugar factories, and excepting certain rates on coal, sheep, and cattle, hereinafter enumerated imposed by authority of the State, are abnormally low, and traffic thereunder fails to produce its fair share of the earnings required to yield revenue sufficient to enable the respondents, under honest, economic, and efficient management, to provide adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service, and thereby accomplish the purposes of the Interstate Commerce Act as set forth in the national transportation policy declared by the Congress to develop and preserve a national transportation system adequate to meet the needs of the commerce of the United States, of the postal service, and of the National Defense. The burden thus cast upon interstate commerce is undue in and to the extent that these intrastate rates and charges are less than they would be on the bases herein prescribed; and these intrastate rates and charges cause, and for the future will cause, undue, unreasonable, and unjust discrimination against interstate commerce.

"4. The undue, unreasonable, and unjust discrimination herein found to exist should be removed by applying to the Utah intrastate rates and charges, on the commodities and traffic herein described, the same respective increases as are and for the future may be maintained by the respondents on like interstate traffic between points in Utah and adjoining States under our authorization in Ex Parte No. 175, provided that increases may not be made in intrastate rates to levels higher than the interstate rates on like traffic to or from Utah for like or greater short-line distances over the same lines of railroad, except in instances where the interstate rates, and

not the intrastate rates, are designated as published to meet motor-carrier competition.

"5. The establishment of increases in intrastate rates and charges as prescribed in finding 4 will not result in unreasonable rates, or rates that are unreasonable in relation to interstate rates, and will substantially increase the respondents' annual revenues.

"6. The increased revenues to the respondents which will result from the increased rates and charges as provided in finding 4 are required from intrastate traffic in Utah in order to enable the respondents to provide adequate and efficient railway transportation service.

"7. In certain instances it appears that the present Utah intrastate rates are now as high as corresponding interstate rates including the Ex Parte No. 175 increases for comparable distances. The intrastate rates specified below, are excepted from the findings herein:

"Rates on sugar beets or beet-sugar final molasses destined to sugar factories.

"Rates on coal, viz:

From Castle Gate to Milford, Utah, slack and other sizes.

From Castle Gate to Lund, Utah, slack and other sizes.

From Castle Gate to Devil's Slide, Utah, slack.

"Rates on sheep, in double-deck cars, viz:

From Lakeside to Wahsatch, Utah.

From Cedar City to Kaysville, Utah.

"Rates on cattle, in single-deck cars, viz:

From Spanish Fork to Ogden, Utah.

"The foregoing findings relate to Utah intrastate rates generally, and are without prejudice to reexamination, upon complaint or otherwise, as to the lawfulness of any individual Utah intrastate rate on any particular commodity.

"An order will be entered carrying into effect the foregoing findings, unless this Commission is notified by the Utah commission, within 30 days from the date of service of this report, that it will permit the increase required to remove the unlawfulness herein found to exist."

The order, after reciting that the Utah commission had failed to notify the Commission within the 30-day period whether it would permit the increase in Utah intrastate rates required to remove the unreasonable and unjust discrimination caused by those rates against interstate commerce, directs the Utah railroads to cease and desist practicing such discrimination by establishing and maintaining for intrastate transportation of commodities (except those therein named) from and to points in Utah, "freight rates and charges which shall be no lower than the approved rates and charges thereon, as provided in said report" (R. 131-132).

PROCEEDINGS IN THE DISTRICT COURT

Appellants filed this suit against the United States of America and the Interstate Commerce Commission February 17, 1956, praying that the Commission's order be enjoined, annulled and set aside and that a temporary restraining order or interlocutory injunction be issued restraining and suspending the Commission's order until final hearing by the court (R. 1-15). Their complaint alleged that the Commission's order was unlawful and void on the principal grounds that the Commission's order in Ex Parte No. 175 granting a nation-wide 15%

increase in interstate rates was itself unlawful in that it granted a "flat horizontal percentage" increase in all freight rates and that any order of the Commission designed to bring intrastate rates into conformity with interstate rates resulting from the Ex Parte 175 order was "beyond the power and authority of the Interstate Commerce Commission and contrary to law;" that the Commission's findings in the instant case were not supported by substantial evidence; and that its order was an "unauthorized and unwarranted invasion of the reserved authority of the state over such intrastate rates in violation of the Constitution of the United States" (R. 11-15). The United States and the Interstate Commerce Commission filed answers denying the allegations of the complaint (R. 32-35). These railroad appellees intervened (R. 27-28) and also filed their answer denying that the Commission's order was unlawful or void and further denying the allegations of the complaint and praying that the complaint be dismissed (R. 19-21).

On March 10, 1956, District Judge Ritter issued a temporary order restraining and preventing the Interstate Commerce Commission and the intervening railroads from making the Commission's order effective, and rejecting a motion of the intervening railroads that the court impound the difference between the then existing intrastate rates and the rates that would be collected as increased by the Commission's order and to refund such difference to persons paying such increased rates if, upon final hearing, the Commission's order should be permanently enjoined and restrained (R. 28-32).

Upon final hearing the majority of the District Court (District Judge Christenson dissenting) held that the Commission's order was supported by substantial evidence

and was lawful and valid in all respects. The court dismissed the complaint and dissolved the interlocutory injunction (R. 39-49). The court entered findings of fact and conclusions of law (R. 65-72) and on June 18, 1956, entered its final decree dismissing the complaint (R. 73-75). Shortly after the final decree was entered the Utah railroads, appellees here, published their tariffs increasing the Utah intrastate rates in conformity with the Commission's order and have been and now are collecting the intrastate rates so increased.

SUMMARY OF ARGUMENT

The purpose of the National Transportation Policy is the "developing, coordinating, and preserving a national transportation system * * * adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense". To accomplish that purpose Congress placed the duty upon the Interstate Commerce Commission, by enactment of Section 15a(2) of the Interstate Commerce Act, to prescribe rates that will provide revenue sufficient to enable the railroads of the country to furnish adequate and efficient railway service. Congress left no part of that duty to the judgment or discretion of the Utah commission or any other state authority.

To prevent interference by state authority with the National Policy, Congress enacted Section 13(4) of the Act, empowering the Commission, upon finding that any intrastate rate or charge causes any undue or unjust discrimination against interstate commerce, to prescribe the rate or charge that will remove such undue discrimination, and the rate or charge so prescribed "shall be observed"—"the law of any State or the decision or

order of any State authority to the contrary notwithstanding.". *Florida v. United States,* 292 U. S. 1, 5.

The purpose of Section 13(4) was to enable the railroads of the country to have compensation "for the intrastate business reasonably proportionate to that for interstate business" and to "restrain undue limitation" (by state commissions) of the earning power of the interstate commerce system in doing state work", leaving State authorities to deal with intrastate rates "as between themselves on the general level" found by the Commission "to be fair to interstate commerce", *Wisconsin R. R. Comm. v. C., B. & Q. R. R. Co.,* 257 U. S. 563, 589-591.

The Commission's order in the instant case, directing that Utah intrastate rates be increased to the level of interstate rates found by the Commission to be reasonable and necessary to enable the railroads to accomplish the purposes of the National Transportation Policy is the direct result of continuing and persistent efforts of the Utah commission to frustrate and interfere with the National Policy by preventing Utah intrastate traffic from bearing its proportionate share of revenues necessary to provide an adequate national railroad transportation system.

I. The Commission's findings and order are amply supported by substantial evidence which shows that the return on the net investment of the railroads serving Utah was only 3.98% in 1948, 2.58% in 1949, 4.33% in 1950, 3.66% in 1951, 3.91% in 1952 and 3.44% in 1953.

The railroads' revenue per ton mile in 1952 on all traffic (interstate and intrastate) in Utah was only 1.258

cents, while in eleven adjoining or surrounding Mountain-Pacific States it was 1.398 cents, in the western district it was 1.393 cents, and in the entire United States it was 1.43 cents. Revenue per ton-mile in Utah increased only 29 percent over the 1939 base period, while in the other areas it increased 37, 36, and 47 percent, respectively.

Despite their accomplishments in increasing their efficiency and economy of operation, the Utah railroads have been faced with increased wages of employees and increased costs of supplies and materials used in their transportation work to the extent that they can not realize fair compensation without increased rates and charges for all of their work, including the transportation of intrastate traffic in Utah.

In Ex Parte No. 175 the Commission found that interstate rates increased by 15% were reasonable and necessary to enable the railroads of the country to provide an adequate railroad transportation system and that the increase should also be applied to intrastate traffic if the purpose of Congress was to be accomplished.

In the instant case the Commission found upon undisputed evidence that the interstate traffic and Utah intrastate traffic is handled in the same trains, by the same crews and transportation facilities, and that conditions incident to intrastate transportation of freight in Utah are not more favorable than those incident to interstate transportation between Utah and adjoining states; that the refusal of the Utah commission to permit the railroads to increase their intrastate rates in Utah to the level of the interstate rates found reasonable by the Commission for interstate traffic resulted in undue

and unjust discrimination against interstate commerce amounting to about $1,880,000 annually; that the Utah intrastate rates were abnormally low and the Utah intrastate traffic failed to produce its fair share of earnings required by the railroads to provide an adequate national railroad transportation system.

The Commission recognized that in a few isolated instances certain Utah intrastate rates were already as high or higher than interstate rates on the same commodities for comparable distances and expressly provided that no intrastate rates should be increased to a level higher than that of the comparable interstate rate, and further provided a "savings clause" that such increase in the level of Utah intrastate rates was "without prejudice to reexamination, upon complaint or otherwise, as to the lawfulness of any individual Utah intrastate rate on any particular commodity."

II. The Commission did not "presume", nor was it required to make a finding, that interstate and Utah intrastate rates were in "proper relationship" prior to the Ex Parte No. 175 increases, although the Commission had previously found that prior to 1935 the Utah intrastate rates generally "were upon the same level" as interstate rates to and from Utah, and the record in the instant case contains no evidence that anything has happened to disturb the then level of the two sets of rates except the persistent refusal of the Utah commission to permit increases in the intrastate rates in that State to the level of interstate rates as increased by the Commission. The Commission's finding that conditions incident to intrastate transportation of freight in Utah are not more favorable than those incident to the interstate transportation between Utah and adjoining states

is not based upon "common knowledge" as claimed by appellants, but upon undisputed evidence of experienced railroad witnesses which appellants admit established the fact found by the Commission.

III. Appellants' contention that the Commission ignored their evidence is contrary to the fact plainly shown by its report that the Commission carefully analyzed and considered the evidence submitted by appellants and other protestants, but found that their evidence was deficient, unreliable and lacking in probative force.

IV. In contending that the order in the instant case is void because of their further contention that the Commission's order in Ex Parte No. 175 authorizing a percentage or "horizontal" increase in interstate rates is itself void, appellants are making a collateral attack upon the order in Ex Parte No. 175. This Court has consistently held that such collateral attack can not be made upon an order of the Commission. *Callanan Road Co. v. United States*, 345 U. S. 507, and cases there cited.

ARGUMENT

INTRODUCTORY

The declared purpose of the National Transportation Policy of the Congress is the "developing, coordinating, and preserving a national transportation system • • • adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense." One means to that end is "to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers." Another is "to encourage the establishment and maintenance of reasonable charges for

transportation services, without unjust discriminations, undue preferences or advantages."

To implement and accomplish the ultimate purpose of the National Policy, Congress has placed upon the Interstate Commerce Commission, by enactment of Section 15a(2) of the Act, in the exercise of its power to prescribe just and reasonable rates, the duty of prescribing rates that will provide revenue sufficient to enable the railroads under honest, economical and efficient management, to furnish adequate and efficient railway service.

Congress left no part of that duty to the discretion or judgment of the Utah commission or any other state commission. Instead, and in the light of its own knowledge of timeworn and successful efforts of many states and their commissions to force undue preference and advantages, by compelling unreasonably and abnormally low freight rates for the intrastate traffic within their respective jurisdictions, Congress has, by enactment of Section 13(4) of the Act, expressly empowered the Commission to prevent state commissions from interfering with the National Policy to establish rates on all traffic that will provide revenues sufficient to develop and maintain an adequate national transportation system and enable the carriers to furnish adequate and efficient railway transportation service.

To this end, that section explicitly directs that upon finding that any intrastate rate, fare or charge "made or imposed by authority of any state," causes "any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful," the Commission "shall

prescribe the rate, fare, or charge" that "will remove such advantage, preference, prejudice, or discrimination." And, to make certain that the states and their commissions shall not interfere with the National Policy, that section provides that the rates, fares or charges so prescribed by the Commission "shall be observed"—"the law of any State or the decision or order of any State authority to the contrary notwithstanding." *Florida v. United States*, 292 U. S. 1, 5.

Thus, Congress intended, by Section 13(4) of the Act, that the railroad system of the country have "a reasonable compensatory return for all the work it does," including compensation "for the intrastate business reasonably proportionate to that for the interstate business," and it has, by Section 13(4), empowered the Commission to "restrain undue limitation [by state commissions] of the earning power of the interstate commerce system in doing state work," leaving state authorities to deal with intrastate rates "as between themselves on the general level" found by the Commission "to be fair to interstate commerce." *Wisconsin R. R. Comm. v. C., B. & Q. R. R. Co.*, 257 U. S. 563, 589-591. In the Ex Parte 175 proceedings, 284 I. C. C. 589, the Commission discharged its exclusive duty to determine revenue needs of railroads of the country as a whole and to authorize interstate rate increases calculated to provide the needed revenues.

The findings in Ex Parte No. 175 contemplated a like increase in intrastate rates and charges generally, including those sought to be made in Utah. *California Intrastate Freight Rates and Charges*, 289 I. C. C. 767, 780; *Louisiana Intrastate Freight Rates and Charges*, 291 I. C. C. 279, 314.

The Utah commission having refused to permit Utah traffic to bear any part of the needed revenues, the increases required on Utah traffic for the purpose of the National Policy must come through the exercise of the Commission's power under Section 13(4) of the Act.

In *Florida v. United States*, 282 U. S. 194, this Court held at pages 210-211:

> "The power of the Congress to authorize the Interstate Commerce Commission to establish intrastate rates in order to remove an unjust discrimination against interstate commerce is not open to dispute. * * * The authority granted by section 13(4) is thus to be considered in the light of the affirmative duty of the Commission to fix rates and to take other important steps to maintain an adequate national railway system.
>
> "As intrastate rates and the income from them must play a most important part in maintaining such a system, the effective operation of the Act requires that intrastate traffic should pay 'a fair proportionate share' of the cost of maintenance. And if there is interference with the accomplishment of the purpose of the Congress because of a disparity of intrastate rates as compared with interstate rates, the Commission is authorized to end the disparity by directly removing it. *Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy Railroad Company, supra; New York v. United States, supra* (pp. 585, 586)."

The foregoing views were reiterated in a second decision in that case, *Florida v. United States*, 292 U. S. 1, wherein the Court held at pages 5-6—

> "Appellants insist that this result was reached because of what was described as the 'dovetail relation' between §13(4) and §15a, and that the amend-

ment of the latter section by Emergency Railroad Transportation Act, 1933, has effected a radical change. They contend that the Commission no longer has authority to remove an unjust discrimination against interstate commerce caused by a disparity of intrastate rates viewed from a revenue standpoint. We are unable to accept that view. Section 13(4) was not amended by Emergency Railroad Transportation Act, 1933. The authority conferred by §13(4) to prescribe intrastate rates for the purpose of removing an unjust discrimination against interstate commerce was not withdrawn. The Congress had knowledge of the construction given to §13(4) by this Court and of the important effect of that construction in relation to intrastate rates found to be inadequate. The conclusion is not lightly to be reached that the Congress would have undertaken to change a policy of such great importance without explicit language indicating that purpose."

INTRANSIGEANCE OF THE UTAH COMMISSION

By Transportation Act 1920 (41 Stat. L. 484), Congress, for the first time, conferred upon the Commission, through the provisions of Section 13(4), the direct power to remove unjust discrimination against interstate commerce resulting from refusal of the several states and their commissions to permit increases in the intrastate rates within their respective states to a level commensurate with the level of interstate rates.

From the time it acquired the direct power over intrastate rates in 1920 to the date of its order in the instant case, the Commission has authorized nine general nation-wide increases in interstate freight rates, with the expectation and intention that the several states would authorize similar increases in intrastate rates. In each of the nine instances, the Utah commission initially de-

ried, in whole or in part, similar increases in intrastate rates in that state (see R. 169-174). Following eight of the nine general interstate rate increases, the railroads operating in Utah have been compelled, in their efforts to derive adequate revenues from the Utah intrastate traffic, to invoke the Commission's powers under Section 13(4) of the Act, after the Utah commission had refused to permit increases requested in Utah intrastate rates commensurate with the increases authorized by the Commission in interstate rates. The cases in which the Commission authorized interstate rate increases and the companion cases in which that Commission felt compelled to exert its authority over Utah intrastate rates are cited in Appendix B hereto.

Until the instant case, the Utah commission, after first refusing, in whole or in part, the requested increases in intrastate rates and following the long delays incurred in necessary proceedings before the Commission under Section 13 and findings of discrimination against interstate commerce caused by the Utah intrastate rates, has finally given its permission to the Utah railroads to increase their intrastate rates in Utah without making it necessary for the Interstate Commerce Commission to issue a mandatory order. This the Utah commission did "in order to avoid the freezing of Utah intrastate railroad rates by federal order" (R. 448).

The long delays resulting from the resistant attitude of the Utah commission against permitting the Utah railroads to increase their intrastate rates in that state has, of course, deprived the railroads of vast amounts of revenue and has gone far toward frustrating and defeating the Congressional intention that Utah railroads shall have compensation "for the [Utah] in-

trastate business reasonably proportionate to that for interstate business" (ante, p. 14).

The following statement in the Commission's report in the instant case (R. 97) is demonstrative of the delaying and frustrating tactics of the Utah commission, and consequent revenue loss by the railroads—

> "In *Utah Intrastate Freight Rates and Charges*, 287 I. C. C. 315, decided December 1, 1952, the respondents asked that we require the Utah Commission to authorize them to increase the intrastate rates and charges corresponding to the interstate increases authorized in Ex Parte No. 162, 266 I. C. C. 537; Ex Parte No. 166, 270 I. C. C. 93, and 270 I. C. C. 403, and Ex Parte No. 168, 276 I. C. C. 9, which increases had been withheld in whole or in part by the Utah Commission. Therein, we found that such increases in the intrastate rates and charges should be permitted, and the Utah Commission by order dated March 18, 1953, authorized respondents to increase their intrastate rates and charges to reflect the interstate increases authorized through and including Ex Parte No. 168. *These increases did not become effective on intrastate traffic until May 1, 1953, or a year after authorization of the third increase in Ex Parte No. 175, above referred to, became effective on interstate traffic.* The respondents estimate that they are being deprived of approximately $1,880,000 annually as a result of the failure of the Utah Commission to permit the increases here sought." (Italics added.)

Further evidence of the Utah commission's determination to prevent Utah intrastate traffic from bearing its share of revenues necessary to maintain an adequate national railroad transportation system appears in the decision of the Commission cited in the above quotation, *Utah Intrastate Freight Rates and Charges*, 287 I. C. C.

315. Referring to increases it had authorized in Ex Parte 166, the Commission's report states at pages 318-319:

> "Thereupon the respondents petitioned the Utah commission for authority to increase their intrastate rates in Utah to the extent authorized by us in Ex Parte No. 166 in the interstate rates. Instead of granting increases to the extent requested, the Utah commission permitted an increase of only 15 percent in the rates on sugar beets, wet or dry beet pulp, limerock (ground or unground), and residual molasses; refused to permit any increase in the rates on nonferrous ores and concentrates (including precipitates, matte, slag, speiss, and flue dust); and on coal and coke permitted increases, per net ton, of only 10 cents in rates of $1.15 or less, 15 cents in rates $1.16 to and including $2.50, and 20 cents in rates above $2.50. In addition, the Utah commission permitted only 50 percent of the maximum increases granted by us on specified commodities. *Later, upon the expressed consent of the intrastate receivers of iron ore at Geneva and Ironton, Utah, the Utah commission granted the full increase authorized by us in the rates on that commodity only to those two points.*" (Italics added.)

With respect to the Utah commission's refusal to permit any part of the increases authorized by the Commission in Ex Parte 168, the report recites at pages 319-320:

> "• • • [i]n dismissing the respondents' petitions, the Utah commission stated that the evidence submitted by the carriers did not show whether 'the revenues from Utah intrastate traffic produce a fair return on that portion of the investment used on Utah intrastate traffic,' and allowed the carriers 90 days to apply for 'further hearing to produce evidence concerning the railroads' operations within the State of Utah.' In dismissing, without prejudice, the carriers' petitions, the position of the Utah commission

was that it could not determine whether the carriers' revenues from Utah intrastate traffic was inadequate unless and until the carriers proved that fact by evidence segregating the expenses incurred in transporting Utah intrastate traffic and comparing them with the revenues derived therefrom. The carriers did not request further hearing in that case because, as repeatedly explained by them to the Utah commission, they considered it impossible to segregate expenses in handling intrastate traffic from the expense of handling interstate traffic.

"In addition to the foregoing, the Utah commission failed to grant the full increases authorized for interstate traffic in Ex Parte Nos. 162 and 166 in the carload rates on coal ashes, coal cinders, coke ashes, coke cinders, crude dolomite, limestone, pumice, sand or gravel, oystershells, et cetera, furnace slag, other than ground open-hearth basic slag, n. o. i. b. n., gannister rock, stone (marble or granite), fluxing stone, and iron-ore tailings."

I. THE COMMISSION'S FINDINGS AND ORDER ARE AMPLY SUPPORTED BY SUBSTANTIAL EVIDENCE

In the instant case the Commission said (R. 117-118):

"* * * [t]he Ex Parte No. 175 increases were authorized for interstate rail traffic throughout the country based upon the total revenue needs of the railroads generally, and have been made effective on interstate traffic generally as well as on intrastate traffic within most of the States. The railroads' need for additional revenue to meet increased operating expenses was the underlying basis for our decision in that proceeding. Those increased operating costs were not confined to interstate traffic, but were and are incurred also on Utah intrastate traffic."

Supplementing the evidence on which the Commission made its findings in Ex Parte 175, the Utah railroads

submitted into the record in the instant proceeding abundant evidence of their need for the additional revenue from Utah intrastate traffic contemplated by the Commission in Ex Parte 175. They also demonstrated the economic ability of that traffic to bear its share of the needed revenue and that they would realize such revenue if permitted to increase their intrastate rates to the extent authorized by the Commission in Ex Parte 175. This evidence is found in the testimony of Witness Kroll (R. 140-154) and in his Exhibits 1 and 2 (R. 419 and 426) and in the testimony and exhibits of other witnesses.

1. *UTAH RAILROADS' REVENUE NEEDS.*

Exhibit 2, page 1, shows that the gross property investment of Class I railroads serving Utah in road and equipment used in transportation service, plus cash and material and supplies, was $2,886,823,152 in 1948, and ranged from $2,987,791,493 in 1949 to $3,538,000,304 in 1953. The net property investment, averaged as of the beginning and end of the year was $2,377,643,947 in 1948, and ranged from $2,417,049,082 in 1949 to $2,842,418,11[illegible] in 1953. The percentage of return on the net investment was 3.98% in 1948, 2.58% in 1949, 4.33% in 1950, 3.66% in 1951, 3.91% in 1952 and 3.44% in 1953 (R. 427).

Total operating revenues of these Utah railroads in 1953 showed an increase of $211,588,516, or about 22%, over 1948. However, in 1953, there were increases in operating expenses of $151,268,304, or about 20%, and $57,232,823, or over 38%, in Net Rents-Debit and Railway Tax Accruals over 1948.

Their net railway operating income in 1948 was $94,576,606 as compared with $97,663,995 in 1953, reflecting an increase in the latter year of $3,087,389, or slightly over 3%, in net railway operating income. From the foregoing, it will be noted that, while the railroads serving Utah had $211,588,516, or about 22% more *gross* revenue in 1953 than they had in 1948, nevertheless, this substantial increase in revenues actually produced only $3,087,389, or slightly over 3% more *net* railway operating income than these Utah carriers realized in 1948.

Operating ratio of the Utah railroads in 1948 was 75.99%, reached a high of 79.91% in 1949, a low of 71.35% in 1950, and since that time has been steadily rising and reached 75.21% in 1953.

Page 2 of Exhibit 2 shows the totals of operating revenues, expenses and the net railway operating income of these same Utah railroads for the first three months of 1954 as compared to a like period in 1953. It will be noted that there are decreases in total operating revenues of $40,152,776; in total operating expenses of $18,848,736; and in net railway operating income of $6,476,206 in the first quarter of 1954 as compared to the like period in 1953. The decrease in net railway operating income is serious, reflecting a reduction of almost 28% under that for the same period in 1953 (R. 428).

Page 3 of Exhibit 2 shows that the average number of employees of the Class I carriers serving Utah in 1948 was 129,492 which declined in 1949 to 120,772 and has been rising steadily until in 1953 it reached 133,013; the average straight time hourly rate of pay increased each and every year from 1948 to and including 1953

from $1.301 in 1948 to $1.898 in 1953; the total straight time compensation of employees of the Utah Class I roads, which was $386,845,411 in 1948, declined to $381,446,301 in 1949 and has steadily increased since that time to $530,506,590 in 1953, an increase of about 37% over 1948.

These figures for 1953 do not include a settlement with the operating brotherhoods amounting to a five cents an hour increase and three weeks vacation with pay after fifteen years of service, nor the cost of living adjustment which was made for non-operating employees, nor the seven or eight cents per hour in fringe benefits recommended by the Presidential Board for non-operating employees. Each one cent per hour increase in wage rates of railroads in the Western District increases their pay roll costs about $13,000,000 per year (R. 150). The foregoing additional increases will aggregate about 78 million dollars per annum increase in pay roll costs for the Class I railroads serving Utah.

Page 4 of Exhibit 2 demonstrates what has happened in the price field of all materials and supplies purchased by the railroads since July of 1949. Comparing January of 1954 with July of 1949, it is to be noted that materials and supplies, other than fuel, have increased 24.7%. Fuel, which is the weighted average of both coal and petroleum products, increased 13.7% and the weighted average of all materials and supplies, including fuel, show an increase of 20.6%. Wages and cost of materials and supplies constitute 90% of carriers' operating expenses, and the remaining 10% consist of such items as depreciation, amortization, insurance, injury to persons, etc., which do not include elements of either wages or materials and supplies (R. 151).

Witness Kroll's Exhibit 1 (R. 420) deals generally with economic trends in the United States, the Western District, the Mountain-Pacific States and the State of Utah.

In pages 1 to 6 of Exhibit 1, 1939 has been used as the base year, this being the first full year following Ex Parte No. 123, which was the last prewar increase rate proceeding before the Commission and the various State Commissions. Pages 5 and 6 of Exhibit 1 shows that in 1952 the revenue per ton mile of the railroads in the United States was 1.43 cents, in the Western District 1.393 cents, in the Mountain-Pacific States, including Utah, 1.398 cents, and in the State of Utah on intrastate and interstate traffic 1.258 cents. Using the earnings in 1939 as a base, such figures for 1952 in the United States represented an increase of 47%, in the Western District 36%, in the Mountain-Pacific States 37% and in the State of Utah only 29% over 1939. Probably one of the reasons why Utah shows an increase of only 29% in earnings per ton mile is that the increase of 15% in Ex Parte No. 175 had not been made effective on Utah intrastate traffic (R. 144).

In the year 1953, revenue per ton mile in the United States was 1.478 cents and in the Western District 1.431 cents, representing increases of 52% and 40%, respectively, over 1939. The figures for the Mountain-Pacific States and the State of Utah for 1953 were not available (R. 142).

Pages 2, 3 and 4 of Exhibit 1 show the following data for the United States, using the year 1939 as the base period: page 2, the indexes of wholesale prices by major groups; page 3, the indexes of the Consumers

Price Index by major groups, and page 4, the indexes of the prices received by farmers. Pages 5 and 6 thereof show the indexes of the ton mile earnings of railroads as previously referred to.

All of such indexes are brought together and compared in the graph on page 1 of Exhibit 1 and, as will be noted when compared to 1939, increases in revenues per ton mile of the railroads in 1953 in the Western District represent only 40% and in the United States 52%, whereas the other indicators of economic situations showed the following increases: Cost of Living Index 93%, Wholesale Prices 120% and Prices paid to Farmers 172% (R. 142).

2. *EFFICIENCY AND ECONOMY OF RAILROADS' OPERATIONS*

Witness Kroll submitted, on page 5 of Exhibit 2, statistical data demonstrating the great gains of the railroads in the Western District in efficiency and economy in their operations and expressed the opinion that the situation of the five Class I railroads serving Utah would not be dissimilar to that of the railroads throughout the West as a whole. There has been substantial improvement, 1952 compared with 1939, as well as substantial improvement, 1952 compared with 1949, which was about the time of Ex Parte No. 175. A major portion of the increased efficiency has been brought about only by substantial expenditures in the nature of capital improvements, including the purchase of larger and better freight cars and diesel-electric locomotives (R. 152). Comparing 1939 with 1952, these data show:

	1939	1952
Average capacity per freight car (tons)	45.9	50.5
Freight car miles per serviceable freight car-day	39.2	54.8

Net ton-miles per serviceable freight car-day	588	1049
Net tons per loaded car	24	30.2
Freight train load (tons)	684	1213
Freight train speed (miles per hour)	17.8	19
Gross ton-miles (trailing load) per freight train hour	32190	52066
Freight locomotive miles per active locomotive day	105.8	137.2

Of these items, perhaps the more significant are the net ton-miles per serviceable freight car which increased nearly 80% from 1939 to 1952 and the gross ton-miles (trailing load) per freight train hour, which increased better than 60% from 1939 to 1952.

From the foregoing, it is clear that, as found generally by the Commission in Ex Parte No. 175, the Utah railroads are efficiently operated and their need for additional revenue from Utah intrastate traffic is not due to inefficient or uneconomical management, but to increased wages, cost of materials and supplies and other causes beyond their control. In fact, it is only with such efficiency, improvements and the rate increases granted by the Commission that the Utah Class I railroads' financial showing has held up even to the low level shown in Exhibit 2 as summarized earlier.

3. *THE WIDE DISPARITY BETWEEN UTAH INTRASTATE RATES AND INTERSTATE RATES RESULTS IN UNJUST DISCRIMINATION AGAINST INTERSTATE COMMERCE BY APPROXIMATELY $1,880,347 ANNUALLY.*

Exhibit 6 (R. 451) shows the total tons of heavier moving commodities, which originated on the Denver and Rio Grande and the Union Pacific in Utah during the year 1953. Their percentage relation, 79.15 percent, to the total tons of all carload freight originated by

those railroads in Utah in 1953, reflects their importance to the Utah railroads.

Exhibit 7 shows the total carloads, intrastate and interstate, of the same commodities as in Exhibit 6, which terminated on the Utah railroads in the months of May, August and November, 1953, and February, 1954, totalling 16,529 intrastate carloads and 3,784 interstate carloads, and for the full year of 1953, 80,289 intrastate carloads and 18,758 interstate carloads. Exhibits 8 to 24, both inclusive, show the Utah destinations receiving either and both the intrastate and interstate carload shipments set forth in Exhibit 7.

Revenue effects of the disparity favoring Utah intrastate traffic was made the subject of a special study by respondents. Witness Kroll described the methods used in making the study (R. 152-153), and showed, on pages 6 and 7 of Exhibit 2, as a result of the refusal of the Utah commission to permit the increases granted by the Commission in Ex Parte No. 175, the Utah railroads were being deprived of $1,880,347 annually, based on the 1953 Utah intrastate traffic movement, which consisted of 142,854 carloads weighing 8,296,542 tons; less-than-carload freight weighing 7,647 tons and 15,120 cars switched in various types of switch movements. The largest loss in revenue is $1,532,550 on products of mines; next is $263,868 on manufactures and miscellaneous, and third is $47,679 on animals and products, which three categories represent about 98% of the total (Exhibit 2, pages 6 and 7).

4. *ECONOMIC CONDITIONS IN UTAH SHOW THAT ITS INTRASTATE TRAFFIC SHOULD NOT BE PREFERRED BY EXEMPTING IT FROM BEARING ITS SHARE OF REVENUE NEEDED BY THE UTAH RAILROADS.*

It is clear from Exhibit 1 and Witness Kroll's testimony that there is no possible justification for the

Utah commission's preferential treatment of the traffic of that State or for the resulting discrimination against interstate commerce. Economic conditions in Utah have made progress equal to or better than in other areas and nationally. In mining, one of the principal tonnage producing industries in Utah, the value of mineral production in the year 1939 was 79 million dollars, and in 1950 was 229 million dollars, an increase of 190% (R. 146, Exhibit 1, page 11).

Total income payments to individuals in Utah in 1952 was 340% greater than in 1939 as compared to increases of 300% in the Western District, of which Utah is a part, and 262% in the United States (R. 144, Exhibit 1, page 7).

Income payments *per capita* in 1939 were $443 in Utah, $510 in the Western District and $539 in the United States. By 1952, income per capita of individuals in Utah had increased to $1,450, those in the Western District to $1,661, and those in the United States to $1,639. The percentage of increase in Utah was 227%, in the Western District 226% and in the United States 204%. This compares rather favorably with the 226% in the Western District, as a whole, and the 204% in the United States, and shows that, relatively speaking, Utah has shared in the increased prosperity of the country during the period 1939 through 1952 (R. 144, Exhibit 1, page 7).

Cash farm income in Utah increased from $136,761,000 in 1946 to $175,747,000 in 1952 (R. 146, page 10 of Exhibit 1).

In population, Utah has shown a growth of 36% from 1939 to 1952, as compared to a growth of 23% in

the Western District and 19% in the United States, as a whole (R. 145, pages 8, 9, Exhibit 1).

Quite frequently in the West the claim is made that it is strictly an agricultural area and somewhat in the nature of a colony to the industrialized East. Comparing the year 1952 to 1939, the increase in nonagricultural employees in the United States, as a whole, was 58%, in the Western District 71% and in Utah 93%. This indicates that, relatively speaking, Utah is increasing its nonagricultural employment faster than either the Western District, of which it is a part, or the United States. It should also be noted that the per cent of nonagricultural employees to total population in Utah is 28.96%, in the Western District 29.02% and in the United States 30.81% (R. 145, page 9 of Exhibit 1). The foregoing figures indicate that Utah has been somewhat successful in changing its general situation from an agricultural status to something that is not related to agriculture.

In the matter of population per automobile registered, Utah has one automobile registered for every 3.4 persons, as compared to 3.2 persons in the Western District and 3.6 persons in the United States, and 2.8 persons in the Mountain-Pacific states (R. 146, page 13, Exhibit 1).

In addition to the evidence and exhibits of Witness Kroll, Witness G. M. Watson, Assistant Freight Traffic Manager of the Union Pacific, with 37 years' experience in traffic and rate work, introduced in evidence and testified relative to Exhibits 3 to 38, both inclusive (R. 167-190).

Witness T. K. Earley, Freight Traffic Manager of the Denver and Rio Grande Western, with 35 years experience in traffic and rate work, introduced in evidence and testified concerning Exhibits 40 to 63, both inclusive (R. 248-263).

In order to show distribution of the heavier moving commodities, maps, Exhibits 8 to 24, both inclusive, were made part of the record showing stations in Utah at which all of the intrastate and interstate carload shipments were terminated in the months of May, August and November of 1953 and February, 1954, at destinations on the Utah railroads.

Exhibits 25 to 36, both inclusive, show all carload shipments of the commodities listed thereon moving intrastate and examples of carload shipments moving interstate to destinations in Utah on the Utah railroads, during the months of May, August and November, 1953, and February, 1954.

Exhibits 40, 41, 49, 50, 52, 53, 62 and 63 show all carload movements of commodities listed thereon moving intrastate and interstate to destinations in Utah on the Utah railroads during the months of May, August and November, 1953, and February, 1954.

As shown, and set forth in considerable detail in the Commission's report (R. 100-114), the record contains extensive evidence with respect to the movement, volume, competition between intrastate and interstate traffic, comparisons showing the higher level (with a few exceptions not here pertinent) of the interstate rates compared with Utah intrastate rates on the following commodities:

Coal
Coke
Iron Ore
Manufactured Iron and Steel Articles
Lead and Zinc Ores, and Ores and Concentrates
Uranium and Vanadium Ores
Waste Materials for Remelting
Clay and Bentonite
Sand and Gravel
Lime Rock
Fuel and Road Oil
Gasoline
Cement
Sugar
Wheat
Animal and Poultry Feed
Sheep and Goats
Cattle and Calves
Class and Merchandise Rates

The railroads' annual revenue loss on some of these commodities is shown in connection with the discussion of them in the Commission's report (R. 100-114). Page 6 of the railroads' Exhibit 2 (R. 432) shows the revenue loss on the Utah intrastate traffic by classes of commodities, as follows:

	Revenue Loss
Products of Agriculture	$ 4,536
Animals and Products	47,679
Products of Mines	1,532,550
Manufactures and Miscellaneous	263,868
Grand Total, Carload traffic	$1,848,633
All L. C. L. Freight	18,243
Grand Total Carload and L. C. L. Traffic	$1,866,876

It is vitally significant that the record shows (negatively, of course) that no freight rate payer or shipper

or receiver, who actually bears the financial result of increased freight rates, opposed the 15% increase in Utah intrastate rates, except T. C. Taylor (R. 400), who appeared in opposition on behalf of the Ideal Cement Company. As shown in the Commission's report (R. 102), the increase in intrastate rates on coal was opposed by the Utah Coal Operators Association, representing producers of coal in Utah, but not shippers or receivers who pay the freight rates; the Utah Citizens Rate Association opposed increases in the rates on manufactured iron and steel articles (R. 106) and in class and merchandise rates (R. 114); and the Utah Mining Association (R. 107) opposed increases in the intrastate rates on ores and concentrates. These associations, however, are not freight rate payers, but instead are more in the nature of professional objectors to anything which might increase the ultimate sales price of their members' products to customers who do pay the freight rates. The revenue loss or the addition of the 15% to the intrastate rates on iron ore amounted to $634,680 (R. 105), but no one appeared in opposition to the increase in the rates on this commodity, which is the most important of the entire list from the revenue standpoint.

Appellants do not dispute or deny the accuracy of any of this mass of evidential facts. Instead, as we understand their position, they contend that this vast amount of evidence affords no basis for the Commission's finding that the lower level of the Utah intrastate rates results in unjust and undue discrimination against interstate commerce. Appellants seem also to contend that the Commission should have held that the large amount of evidence submitted by the railroads was over-balanced and outweighed by evidence submitted by appel-

lants concerning two or three items or aspects of the case, as they see it.

As appellants do not question the Commission's power to exercise authority over intrastate rates, nor the adequacy of the findings made by the Commission, but, instead, base their case upon the contention that the Commission's findings and the order are not supported by substantial evidence, we proceed now to cite and discuss the evidence of record which furnishes ample support and a substantial evidential basis for each of the findings made by the Commission.

Finding 1. This finding is that conditions incident to intrastate transportation of freight in Utah "are not more favorable" than those incident to interstate transportation between Utah and adjoining States.

The finding is fully supported by the evidence of Witnesses Jensen, Assistant Superintendent for the Union Pacific Railroad, who has jurisdiction over all of that company's lines in Utah (R. 242-248), and Bradford, Vice President of The Denver and Rio Grande Western Railroad Company (R. 317-323). The evidence of these two operating witnesses, Jensen with 23 years experience and Bradford with 40 years experience, on their respective railroads, shows that intrastate and interstate traffic hauled by railroad in Utah is handled on the same trains, by the same crews and other employees and through the same yards and other facilities. Witness Jensen testified (R. 244)—

> "We don't make any distinction between the two traffics, in fact the same crews, the same clerks, and the same trains haul interstate traffic as intrastate traffic.
>
> * * * * *

"It is intermingled traffic in all the trains, intermingled interstate and intrastate.

* * * * *

"L. C. L. [traffic] is intermingled in the same car, it is loaded in the same car by the same crews billed by the same clerks and it is intermingled in the same car and just separated at its destination, as it arrives at the destination."

Witness Jensen further testified (R. 244-246) that the Union Pacific has 11 branch lines in Utah, consisting of 225½ miles and that the Union Pacific's main line mileage in Utah is 452½ miles; that both intrastate and interstate shipments are handled on all of the branch lines as well as the main line and that on both the main line and the branches interstate and intrastate shipments in Utah move under "[i]dentically the same conditions."

Witness Bradford testified (R. 317-322) that intrastate and interstate traffic handled by The Denver and Rio Grande in Utah is intermingled in the same trains with "[n]o distinction whatever" in the handling of the two types of traffic; that "[w]e do not differentiate in our traffic at all;" that both types of traffic are handled by the same train crews and by "[t]he same agent, the same accounting department, the same traffic department, we don't make any distinction in any of our departments, except to the extent that we do make certain reports to state commissions based on certain formulas that attempt to make an allocation between certain states."

Witness Bradford further testified that the same situation prevails in the handling by the Denver and

Rio Grande of less than carload shipments which are intermingled in the same car.

Witness Bradford testified that a large part of the Denver and Rio Grande traffic originates on mountainous branch lines in Utah and moves intrastate in that state; that rates of pay for train crews operating in mountainous territory are higher than rates of pay in non-mountainous areas, thus increasing the cost of hauling that traffic. Comparing the handling of traffic on the main line and branch lines of the Denver and Rio Grande in Utah, Witness Bradford said:

> "Well, it is somewhat of a relative proposition. You take the Sunnyside branch where we originate the coal for the Kaiser people, and also where we receive from the Carbon County Railroad the coal that originated from Geneva, and we handle awfully big trains, very big trains. Those are you might say captive mines, although they are commercial mines on that same branch. If you move to our Spring Canyon branch, which is a very difficult branch from an operating standpoint, because of the high grades, we are restricted to the size of train that we can handle there. We only handle 50 percent of the cars on the train on the Spring Canyon branch that we do on the Sunnyside branch. Up on the Kenworth branch where the big Independent mine is located the same situation exists.
>
> "The Sunnyside branch will average more cars per train for example from Sunnyside down to Mounds, the main line point, than we can from Mounds on the main line into Helper. It is pretty difficult. But normally your main line movements are larger than your branch line movements." (R. 321)

None of this testimony was disputed or contradicted by appellants or any other party of record. In other 13th Section proceedings the Commission has deemed sufficient evidence which justified a finding that intrastate and interstate traffic are handled under substantially similar circumstances and conditions. *Montana Intrastate Freight Rates and Charges*, 284 I. C. C. 167, 177, 204; *Utah Intrastate Freight Rates and Charges*, 287 I. C. C. 315, 343; *Wyoming Intrastate Freight Rates and Charges*, 287 I. C. C. 743, 755; *California Intrastate Freight Rates and Charges*, 289 I. C. C. 767, 779, 780. And the courts have held such finding ample to support the orders of this Commission. *Illinois Commerce Comm'n v. U. S.*, 292 U. S. 474, 482, 483; *King v. United States*, 344 U. S. 254, 273.

In *Emergency Freight Charges Within Utah*, 213 I. C. C. 249, the Commission found at page 256—

> "We find that the transportation of the intrastate traffic under the rates here in issue and of the interstate traffic to and from points in Utah takes place under substantially similar circumstances and conditions. * * *"

In *Utah Intrastate Freight Rates and Charges*, 287 I. C. C. 315, the Commission made the following findings at page 325—

> "The figures above shown reflecting increased operating costs, pertain to the respondents' entire systems. There is no separation as between interstate and intrastate traffic. Intrastate traffic handled within Utah and interstate traffic to, or through points in that State are handled in the same trains, by the same crews and other employees, and through the same yards and other facilities. In the loading, unloading, and line-haul movement no distinction is made between intrastate and interstate traffic.

"While there is no practical way of separating operating expenses as between interstate and intrastate traffic, the latter is developed principally on branch lines, and is handled in local trains as to which, because of certain operating difficulties, the train crews receive a higher rate of pay than those operating on main lines in other than local train service. The bulk of the Utah intrastate traffic handled by the Union Pacific is in mountain territory where there is better than a 2-percent grade, requiring extra precautions, extra braking devices on cars, and restriction on the number of cars and tonnage per train or per locomotive."

At page 343, the Commission further found—

"The proportionate percentage of each individual class of traffic moving intrastate and interstate is not shown. Nevertheless, where, as is the case here, the intrastate and the interstate traffic, as a whole, moves under substantially similar circumstances and conditions, and the expenses of handling the two classes of traffic, being so interwoven that no practicable method of separating them is available, there is no occasion for any attempt to segregate costs of intrastate service from those of interstate service."

Appellants attempt by a weird and wholly fallacious process to escape or nullify the probative effect of the undisputed testimony of witnesses Jensen and Bradford. (Jurisdictional Statement pages 8-9.) First, they concede that the undisputed testimony of those two witnesses "establish that the railroads handled interstate and intrastate freight in the same manner without distinction." But, they say—

"This, however, was not a matter that required any evidence. It is a matter of common knowledge * * *

of which the Commission and the courts should and have taken judicial notice."

Then they condemn "common knowledge" as lacking adequate evidential support, by saying—

"* * * [t]o rely entirely on such state of facts [common knowledge] to establish that 'all factors bearing on the reasonableness of the rate' are the same, ignores the all important element of density of traffic."

Clearly, the Court must reject this fantastic method of attempting to escape the impact and probative force of undisputed evidence, and to establish a basis for attacking the Commission's order. Whether the railroads handle interstate and Utah intrastate traffic in the same trains, by the same crews, over the same rails and through the same facilities plainly is not a matter of "common knowledge" but is a question of fact to be established by evidence. The Commission did not rely upon "common knowledge." It properly relied upon the undisputed testimony of Witnesses Jensen and Bradford which, appellants admit, "established that the railroads handled interstate and intrastate freight in the same manner without distinction."

Moreover, the matter for the Commission's determination was not the "reasonableness" of the Utah intrastate rates, for; as held by this Court in *United States v. Louisiana*, 290 U. S. 70, 78—

"* * * §13(4) does not in terms require the Commission to find that the intrastate rates which it prescribes are reasonable. * * *"

The question for the Commission's determination was "that of the relation of [Utah intrastate] rates to

income," *Florida v. United States,* 282 U. S. 194, 214. Hence, there was no necessity for evidence covering "all factors," including "density of traffic" bearing upon the "reasonableness" of the Utah intrastate rates. As held by this Court in the *Louisiana* case, *supra,* page 79—

> "* * * [i]t sufficed that the Commission found that Louisiana showed nothing in the circumstances of its agriculture and industry or its traffic conditions so different from the rest of the country as to lead to the conclusion that the intrastate rates, raised to the reasonable general interstate level, would not themselves be reasonable; and that it saved the rights of interested parties to test the reasonableness of any individual rate."

Finding 2. This finding is that the amounts and percentages by which interstate freight rates and charges between points in Utah and points in other states were increased, as authorized in Ex Parte 175 "are just and reasonable". In Ex Parte 175, after long and tedious proceedings and upon voluminous evidence (284 I. C. C. 589), the Commission found that "all basic freight rates and charges of petitioning railroads", except as therein provided, "may be justly and reasonably increased 15 percent" (284 I. C. C. 661). At page 660 of its report in that case the Commission stated that the factual situation before it establishing the railroads' need for additional revenue called for the exercise of its duties as summarized by this Court in *I. C. C. v. Jersey City,* 322 U. S. 503, 522-523, and that—

> "* * * [w]e are responsible for maintaining a system of transportation adequate for the purposes of national defense. We are without power to protect the essential transportation agencies from rising labor

and material costs, such as the foregoing report shows have come upon them. We can decide only how such unavoidable costs shall be met. Our choice, as indicated by the Court, is between (1) increased rates and charges, (2) defaults and receiverships and reorganizations, or (3) offsetting inadequate service or delayed maintenance. All these considerations must be weighed by us with the needs of national defense, as well as avoiding inflationary tendencies, as a public responsibility. Considering as well the needs of commerce, the rule laid down in the declaration of national transportation policy for our guidance in administration of the act, *the choices of determination stated by the Court eliminate the second and third and leave only the first as conforming to the standard.*" (Italics added.)

"For the reasons stated in our former reports, and upon the record then before us, supplemented and now far more extensive and current, we conclude that we should now authorize further increases in rates and charges beyond those previously authorized, substantially as sought by petitioners. The findings made reflect this conclusion."

In connection with its findings in Ex Parte No. 175 that interstate rates "may be justly and reasonably increased 15 percent", the Commission found (284 I. C. C. 612)—

"Judged by any standard shown of record, the rates of return earned or prospectively to be earned by the railroads by the districts and regions specified in our former reports in this case, are substandard. Some important roads are earning little enough that a continuance of the earnings situation will imperil their solvency, while some are in comfortable condition. Neither the strongest nor the weakest lines can control the rate adjustment; and as has been shown, the great body of the rail carriers are in the middle class, with aggregate earnings that for the

immediate future must be considered as substandard, and inadequate."

In the instant case the Commission found (R. 117-118)—

> "The record is convincing that the transportation conditions affecting Utah intrastate traffic differ in no material respect from those affecting interstate traffic to and from that State, and that Utah intrastate traffic is no less able to bear the full increase sought than the interstate traffic. The Ex Parte No. 175 increases were authorized for interstate rail traffic throughout the country based upon the total revenue needs of the railroads generally, and have been made effective on interstate traffic generally as well as on intrastate traffic within most of the States. The railroads' need for additional revenue to meet increased operating expenses was the underlying basis for our decision in that proceeding. *Those increased operating costs were not confined to interstate traffic, but were and are incurred also on Utah intrastate traffic.*" (Italics added.)

As said by this Court in *King v. United States*, 344 U. S. 254, at page 272—

> "In the absence of any showing that it is not applicable to Florida [Utah], the evidence which forms the basis of the Commission's nationwide order [Ex Parte 175] becomes the natural basis for its Florida [Utah] order."

In *Arkansas Public Service Commission v. United States*, 147 F. Supp. 454, affirmed by this Court October 14, 1957, the opinion of the three-judge court, by Circuit Judge Whittaker, sustaining a 13th Section order of the Commission (so far as here pertinent) requiring increases in Arkansas intrastate rates, said at pages 463-464—

"Here the Commission has applied to the Arkansas intrastate rates the same conclusions it reached, in Ex Parte Nos. 166, 168 and 175, as to the need of the rail carriers for increased revenue on a national basis and has distributed the burden within Arkansas on the same lines it followed when estimating the revenues available in the southwestern territory from intrastate as well as interstate operations, as was done in Florida and approved by the Supreme Court in the King case, 344 U. S. at page 272, 73 S. Ct. at page 269, and here, as in that case, 'The evidence which forms the basis of the Commission's nation-wide order becomes the natural basis for its [Arkansas] order'. King case, 344 U. S. at page 272, 73 S. Ct. at page 269.

"As was said, under like circumstances, in Illinois Commerce Commission v. United States, 292 U. S. 474, 483-484, 54 S. Ct. 783, 787, 78 L. Ed. 1371:

'The decision in the first proceeding, that the increase in the interstate rate was reasonable, was made in the hope that the state commissions would bring intrastate rates into harmony. When they failed to do so, the Commission reaffirmed its finding that the new interstate rates were reasonable and found that the intrastate rates must be raised in order that the intrastate traffic may bear its fair share of the revenue burden. It is plain from the nature of the inquiry that the rate level, to which both classes of traffic were raised, was found reasonable on the basis of the traffic as a whole. Where the conditions under which interstate and intrastate traffic move are found to be substantially the same with respect to all factors bearing on the reasonableness of the rate, and the two classes are shown to be intimately bound together, there is no occasion to deal with the reasonableness of the interstate rates more specifically, or to separate intrastate and interstate costs and revenues. Compare American Express

Co. v. [State of] South Dakota ex rel. Caldwell, 244 U. S. 617, 37 S. Ct. 656, 61 L. Ed. 1352; United States v. [State of] Louisiana, supra [290 U. S. 70, 54 S. Ct. 28, 78 L. Ed. 81]; State of Florida v. United States, supra [292 U. S. 1, 54 S. Ct. 603, 78 L. Ed. 1077].' "

In the instant case the Commission's procedure or method of applying the Ex Parte 175 increases to Utah intrastate rates was the same as that in the *King* case, in the *Arkansas* case, and, for that matter, in all other 13th Section cases in which this Court has sustained the Commission's orders. This was clearly recognized by the District Court in sustaining the order in the instant case (R. 46-48).

Finding 3. Here the Commission finds that present Utah intrastate freight rates, with certain exceptions, "are abnormally low"; that the Utah intrastate traffic "fails to produce its fair share of the earnings required to yield revenue sufficient" to accomplish the purposes of the Interstate Commerce Act; that "the burden thus cast upon interstate commerce is undue in and to the extent that these intrastate rates and charges are less than they would be on the bases herein prescribed" and that the Utah intrastate rates cause and in the future will cause "undue, unreasonable, and unjust discrimination against interstate commerce."

Appellants deny that Utah intrastate rates are abnormally low and insist that, instead, the level of the Utah rates is higher than the level of the interstate rates (App. Br. pp. 25-28). To support their contention appellants have selected and cited a few *individual* intrastate rates that are higher than interstate rates on the same commodities for comparable distances. The

Commission recognized the existence of this exceptional situation as to a few individual rates. For example, its report states (R. 103) that an exhibit of the Utah Coal Operators Association "shows two instances in which the Utah intrastate rates are now on a higher basis, mile for mile, than interstate rates"; with respect to rates on sheep and goats the report cites two instances (R. 112) where the intrastate rates exceed the interstate rates including the Ex Parte 175 increases; and the report refers (R. 113) to one instance where the intrastate rate "is now as high as the interstate rate" on cattle in single-deck cars.

But the Commission carefully guarded against any injustice arising from the application of the increases to these exceptional instances where intrastate rates are as high as or higher than interstate rates by providing (R. 119) in Finding 4—

> "* * * that increases may not be made in intrastate rates to levels higher than the interstate rates on like traffic to or from Utah for like or greater short-line distances over the same lines of railroad, except in instances where the interstate rates, and not the intrastate rates, are designated as published to meet motor-carrier competition."

The order expressly exempts from the increases the intrastate rates on certain specified commodities and provides that Utah intrastate rates shall be established which shall be "no lower" than the approved rates and charges as provided in the report (R. 131-132). Thus, in no instance has the Commission authorized any increase in an intrastate rate which is already as high as the corresponding interstate rate.

As the Commission was dealing with the general level of the Utah intrastate rates and with "the relation of rates to income", *Florida v. United States*, 282 U. S. 194, 214, the isolated instances cited by appellants in which the intrastate rates were as high as or higher than comparable interstate rates are of no significance, particularly since the Commission withheld permission to increase such intrastate rates.

As previously shown, the Commission has felt compelled, under the mandate of Section 13(4) of the Act, to review the relation or disparity between general level of Utah intrastate rates and the general level of interstate rates at frequent intervals since 1920. Following its decision in *Emergency Freight Charges, 1935*, 208 I. C. C. 4, authorizing increases in interstate rates, the Commission reviewed and ordered similar increases in Utah intrastate rates, with certain exceptions, *Emergency Freight Charges Within Utah*, 213 I. C. C. 249. At page 250 of the latter decision, the Commission found—

> "*Prior to April 18, 1935, the intrastate rates within Utah generally were upon the same level as the interstate rates applying to and from that State.* To illustrate the existing disparities respondents compare, for approximately the same distances, the interstate class rates and the interstate rates on such commodities as brick, cement, salt, lime, limerock, plaster, petroleum, fuel oil, and canned or evaporated milk, with lower intrastate class rates and rates on the above commodities applicable within Utah. Generally, the differences in the rates are measured by the amounts of the emergency charges authorized by us. Respondents take the position that since Utah shippers are not required to pay the emergency charges on traffic moving intrastate, such shippers

and the localities in Utah between which shipments may move are unduly preferred and that parties shipping into Utah from points outside that State who are compelled to pay the emergency charges are subjected to unjust discrimination." (Italics added.)

At page 256 of that decision, the Commission further found—

"We find that the transportation of the intrastate traffic under the rates here in issue and of the interstate traffic to and from points in Utah takes place under substantially similar circumstances and conditions; and that the present Utah intrastate traffic is not contributing its just proportion to the revenues of the carriers, and by reason of that fact respondents are suffering substantial losses in revenues to which they are entitled."

The only thing that has happened to alter the relationship between the general level of the interstate and intrastate rates since the Commission found in 1935 that Utah intrastate rates and interstate rates to and from Utah "generally were upon the same level" has been the refusal, in whole or in part, of the Utah commission to permit increases in its intrastate rates following general increases ordered by the Commission in interstate rates. In other words, the level of the Utah intrastate rates has been held down by the Utah commission (see R. 168-174), while the interstate rates to and from Utah have gradually risen to their present level, due to increased railroad wages, costs of materials and supplies used by railroads and other costs generally.

Although in several other instances, upon being confronted with findings after hearings by the Commission

that the Utah rates unduly discriminated against interstate commerce, the Utah commission has finally permitted the Utah rates to be increased, this has not made up for loss of railroad revenue resulting from the denial by the Utah commission of increases in rates where no 13th Section proceedings were instituted by the Commission following its authorization of general increases in interstate rates, such as in Ex Parte No. 123 (see Appendix B), or for the railroads' loss of revenues during the long periods they were prohibited by the Utah commission from increasing the intrastate rates.

In any event, the flat refusal of the Utah commission to permit any increase in its intrastate rates following the Commission's nationwide authorization to increase interstate rates 15% in Ex Parte 175, results directly in the general level of the Utah intrastate rates being 15% lower than the general level of interstate rates found by the Commission to be necessary for the purposes of the Act to provide efficient service and maintain an adequate railroad transportaton system. This, we submit, fully justified the Commission's finding that the Utah rates "are abnormally low" and that the Utah traffic failed "to produce its fair share of the earnings" required to accomplish the purposes of the Act. As previously pointed out, this Court has repeatedly held that income from intrastate rates must play a most important part in maintaining an adequate national railroad transportation system and must pay "a fair proportionate share" of the cost of maintaining such a system. See quotation, ante page 19, from *Florida v. United States*, 282 U. S. 194, 210-211.

The insistence of the Utah commission that the level of intrastate rates be maintained at least 15% lower

generally than the level of interstate rates to and from Utah, under substantially similar transportation conditions, obviously results in an undue burden upon interstate commerce and fully supports and justifies the Commission's finding that the Utah intrastate rates cause, and in the future will cause "undue, unreasonable, and unjust discrimination against interstate commerce."

Applied to individual rates, the unjust discrimination against interstate commerce is sharply illustrated by Exhibit No. 37 (R. 501), which makes the following comparison between Utah intrastate "class" rates for comparable distances with interstate rates—

From	To	Miles	Rate (cents per cwt.)
(Salt Lake City, Utah	Cache Jct., Utah	85	80)
(Pocatello, Idaho	Cache Jct., Utah	85	92)
(Salt Lake City, Utah	Wasatch Utah	101	109)
(Salt Lake City, Utah	Wyuta, Wyo.	107	125)
(Salt Lake City, Utah	Portage, Utah	94	102)
(Salt Lake City, Utah	Woodruff, Ida.	98	125)
(Salt Lake City, Utah	Utida, Utah	99	110)
(Salt Lake City, Utah	Anderson, Ida.	100	137)
(Salt Lake City, Utah	Lewiston, Utah	126	131)
(Salt Lake City, Utah	Franklin, Ida.	128	151)

The unjust discrimination against interstate commerce is further illustrated by Exhibit 45 (R. 524), portraying the result of Utah commission's refusal to permit any increase in intrastate rates on coal. The Commission authorized an increase in interstate coal rates of 12% subject to a maximum of 40 cents per net ton. Exhibit 45 shows that while Utah intrastate rates for comparable distances were previously lower per ton of 2,000 pounds than interstate rates, the disparity be-

tween the intrastate rates and the interstate rates on coal, resulting from the Utah commission's refusal to allow any increase in Utah intrastate rates, has very greatly and burdensomely increased. The resulting disparity between the two sets of rates on coal is shown in the following tabulation taken from Exhibit 45:

From
Castle Gate, Utah

To	Miles	Rate in cents per ton of 2000 lbs.	
(Portage, Utah	209		346
(Woodruff, Idaho	213	346+40¢=	386
(Uvada, Utah	322		555
(Lien, Nevada	326	565+40¢=	605
(Wendover, Utah	237		505
(Pilot, Nevada	254	515+40¢=	555
(Lucin, Utah	254		505
(Tecoma, Nevada	266	515+40¢=	555
(Westwater, Utah	152		308
(Mack, Colo.	161	360+40¢=	400

Iron ore is the most important commodity, from the standpoint of revenues, that moves under Utah intrastate rates. The refusal of the Utah commission to permit the Ex Parte 175 increase to be made in intrastate rates on iron ore resulted in undue discrimination against interstate commerce amounting to $634,680 annually.

No shipper or producer has opposed increasing Utah intrastate rates on iron ore to the level of interstate iron ore rates as increased under Ex Parte 175. (See also R. 448).

With respect to iron ore the Commission found (R. 105)—

> "Iron ore is produced in Utah and shipped to steel mills in the State and in California, Colorado, and at points east of Chicago, Ill. During the year

1953, 57,014 carloads were shipped intrastate from Iron Springs, Desert Mound, and Iron Mountain, Utah, to Geneva and Ironton. In the same period, 17,844 carloads moved to Minnequa, Colo., 2,631 to Fontana, Calif., 1,071 to Long Beach, Calif., and 2,203 to points east of Chicago, or a total of 23,749 carloads interstate. *Competition between steel mills located in California, Utah, and Colorado is very keen, and the nonapplication of the 12-percent increase under Ex Parte No 175 to the intrastate rates in Utah gives a definite and serious advantage to Utah steel mills. The California steel mills, seeking to have the Ex Parte 175 increase removed from their rates on iron ore, have complained to the railroads about the failure to increase the Utah intrastate rates.*" (Italics added.)

From the standpoint of revenue the intrastate transportation of coal in Utah is second to iron ore in importance. The importance of the Utah intrastate coal traffic to the railroads and the very substantial extent of the undue discrimination against interstate commerce in this commodity alone is indicated in the following statement in the Commission's report (R. 100)—

"*Coal*—During May, August, and November, 1953, and February, 1954, there were 11,466 carloads of coal moved intrastate in Utah, compared with 3,551 carloads moved interstate to points in Utah. The total charges collected by the Utah railroads on the 11,466 carloads moved intrastate amounted to $1,636,459, which would have been $1,827,325, or $190,866 more, if the increases sought had been in effect. Expanded to a full year, this indicates that in the 12 months April 1, 1953, to March 31, 1954, the *respondents lost approximately $572,598 in revenue on Utah coal moving intrastate*, because the Utah commission refused to permit the same rate increases authorized in interstate coal

rates in Ex Parte No. 175. The Ex Parte No. 175 increase on coal and coke is 12 percent, subject to a maximum of 40 cents per net ton." (Italics added.)

The tabulation immediately following that statement (R. 101), shows the increasing disparity between the intrastate and the interstate rates resulting from the Utah commission's refusal to permit increases in the Utah intrastate coal rates.

Exhibit 21 (R. 467; reduced almost to obscurity in printing) was introduced to show the distribution of carloads of coal in Utah. Both intrastate and interstate shipments move to each of 17 destinations. At 2 destinations only interstate shipments and at 72 destinations only intrastate shipments were received.

Interstate carloads of coal to Utah destinations moved from points in Arkansas, Colorado, Oklahoma, Pennsylvania, Washington and Wyoming.

The effect of the refusal of the Utah commission to permit raising the level of Utah intrastate coal rates has been to prevent the railroads, because of competition between interstate and Utah intrastate coal, from realizing the 15% increase authorized by the Commission on some interstate coal rates (R. 251).

That the unjust discrimination in the intrastate coal traffic alone is real and substantial is undisputed and clearly appears from the statement quoted above from the Commission's report, showing that in a 12-month period approximately 34,398 carloads of coal moved intrastate in Utah and 10,653 carloads moved interstate. Thus, the unjust discrimination against interstate commerce in coal alone approximated $572,598.00 for that year.

Finding 4. This finding is that the unjust discrimination found by the Commission to exist against interstate commerce should be removed by applying to the Utah intrastate rates on the commodities and traffic described, the same respective increases that the Utah railroads apply and maintain on like interstate traffic to and from Utah under Ex Parte No. 175—

> "* * * provided that increases may not be made in intrastate rates to levels higher than the interstate rates on like traffic to or from Utah for like or greater short-line distances over the same lines of roalroad, except in instances where the interstate rates, and not the intrastate rates, are designated as published to meet motor-carrier competition."

In short, "finding" 4 is merely the Commission's exercise of its duty and discretion under Section 13(4) of the Act to "prescribe the rate * * * to be charged * * * in such manner as, in its judgment, will remove such * * * discrimination" as it has found to exist against interstate commerce. This is "judgment" based, of course, upon transportation conditions and other facts and circumstances surrounding the intrastate and interstate rates. And it is not only logical but necessary to remove the unjust discrimination that the intrastate rates be increased to the level of the interstate rates in view of the Commission's findings upon the evidence (R. 100, and 117-118) that—

> "For the most part, intrastate traffic handled within Utah and interstate traffic to or through points in that State are handled in the same trains by the same crews and other employees, and through the same yards and other facilities. No distinction is made between intrastate and interstate traffic in the loading, unloading, and line-haul movement."
>
> * * * * * *

"The record is convincing that the transportation conditions affecting Utah intrastate traffic differ in no material respect from those affecting interstate traffic to and from that State, and that Utah intrastate traffic is no less able to bear the full increase sought than the interstate traffic. The Ex Parte No. 175 increases were authorized for interstate rail traffic throughout the country based upon the total revenue needs of the railroads generally, and have been made effective on interstate traffic generally as well as on intrastate traffic within most of the States. The railroads' need for additional revenue to meet increased operating expenses was the underlying basis for our decision in that proceeding. Those increased operating costs were not confined to interstate traffic, but were and are incurred also on Utah intrastate traffic.

* * * * *

"The conditions incident to the intrastate transportation of freight in Utah are not more favorable than those incident to the interstate transportation between Utah and adjoining states."

Finding 5. This finding is (R. 119) that:

"The establishment of increases in intrastate rates and charges as prescribed in finding 4 will not result in unreasonable rates, or rates that are unreasonable in relation to interstate rates, and will substantially increase the respondents' annual revenues."

Having found, after long hearings and upon voluminous evidence in Ex Parte 175, that the interstate rates "may be justly and reasonably increased 15 percent" (284 I. C. C. 661), and in the instant case, that "transportation conditions affecting Utah intrastate traffic differ in no material respect from those affecting interstate traffic to and from that State," and that condi-

tions incident to the intrastate transportation of freight in Utah "are not more favorable" than those incident to interstate transportation (R. 117-118), the conclusion was inescapable that to raise the intrastate rates to the same "level" (but no higher than) the interstate rates would "not result in unreasonable rates, or rates that are unreasonable in relation to interstate rates." In the words of this Court in *King v. United States*, 344 U. S. 254, 272:

> "The Commission has applied to the Florida operations the same conclusion it reached as to the need for increased revenue on a national basis and has distributed the burden within Florida along the same lines it followed when estimating the revenues available in the southern territory from intrastate as well as interstate operations. In the absence of any showing that it is not applicable to Florida, the evidence which forms the basis of the Commission's nationwide order becomes the natural basis for its Florida order."

In Ex Parte 175 the interstate rates increased by 15 percent were found reasonable in relation to the railroads' need for income necessary to effectuate the purpose of the Act to provide an adequate national railroad transportation system. Likewise, in changing Utah's "scale of intrastate rates in the interest of the carrier's revenue, the *question is that of the relation of rates to income.*" (Italics added, *Florida v. United States*, 282 U. S. 194, 214.) Having found transportation conditions similar for Utah intrastate traffic as for interstate traffic, for which reasonable rates had been prescribed in Ex Parte 175, it necessarily followed that the level of the Utah rates should be commensurate with the level of the rates found reasonable for interstate traffic.

The further finding that the increases in Utah intrastate rates "will substantially increase the respondents' annual revenues," is based upon the experienced and informed judgment of traffic officers of the Utah railroads, including their personal knowledge of increased revenues resulting from past increases in the Utah intrastate rates. For example, speaking for the Utah railroads concerning coal and other products of mines, Witness Earley testified that while increasing the Utah rates might cause some loss in "domestic" (for heating residences, etc.) coal, but that it was the view of the Utah railroads that "the vast preponderance" of the coal traffic would be retained by the railroads.

There were fundamental reasons why substantial additional revenues could reasonably be expected from the increase in rates on Utah intrastate traffic. Of the total amount, $1,880,347, being lost annually, it was shown that $1,849,097 would be derived from three classes of heavy, bulk traffic; namely, products of mines (principally coal, iron ores and ores and concentrates), $1,532,550; manufactures and miscellaneous $263,868 and animals and products $47,679, leaving only about $30,000 to come from other traffic.

In other words, the traffic that would produce the major portion of the additional railroad revenue is in heavy loading carload commodities moving in bulk and in large volume, which is not adaptable to diversion to trucks or other means of transportation (R. 254). The Commission considered this fundamental fact, noting (R. 117) that 80 percent of the total additional revenue sought from Utah intrastate traffic would come from products of mines.

Finding 6. This finding is that the increased revenues resulting from the increased rates "are required from intrastate traffic in Utah in order to enable the respondents to provide adequate and efficient railway transportation service." This finding logically and necessarily follows its "natural basis" found in Ex Parte 175, *King v. United States,* 344 U. S. 254, 272, for, as said by the Commission (R. 117)—

> "* * * [t]he Ex Parte No. 175 increases were authorized for interstate rail traffic throughout the country based upon the total revenue needs of the railroads generally, and have been made effective on interstate traffic generally as well as on intrastate traffic within most of the States. The railroads' need for additional revenue to meet increased operating expenses was the underlying basis for our decision in that proceeding. Those increased operating costs were not confined to interstate traffic, but were and are incurred also on Utah intrastate traffic."

The Commission's finding that additional revenue from Utah intrastate traffic was required to enable the railroads to provide adequate and efficient services is fully supported by the testimony of Witness Kroll, showing that the gross property investment of the five Class I railroads which serve Utah in road and equipment used in transportation service, plus cash and material and supplies, was $2,886,823,152 in 1948 and ranged from $2,987,791,493 in 1949 to $3,538,000,304 in 1953; and that the net property investment averaged as of the beginning and end of the year was $2,377,643,947 in 1948, and ranged from $2,417,049,082 in 1949 to $2,842,418,112 in 1953; that the percentage of return on net investment of the Utah railroads was 3.98% in 1948, 2.58% in 1949, 4.33% in 1950, 3.66% in 1951, 3.91% in

1952 and 3.82% in 1953 (Exhibit 2, page 1; R. 147). The evidence of this witness also showed that there had been a serious drop in net railway operating income of $6,476,206 in the first quarter of 1954 as compared to the same period in 1953, reflecting a reduction of almost 28% under that for the same period in 1953 (Exhibit 2, page 2; R. 149).

The record also shows that in 1952 the revenue per ton-mile of the railroads in the United States was 1.43 cents; in the Western District 1.393 cents; in the Mountain-Pacific States (including Utah) 1.398 cents; but *in the State of Utah the revenue was only 1.258 cents per ton-mile.*

With the railroads in Utah earning less than 4% on their net investment, it is quite evident, as found by the Commission, that they required the increased revenues to enable them to provide adequate and efficient railway transportation service.

Finding 7. This "finding" merely points out that in a few isolated instances Utah intrastate rates were already as high as the interstate rates, exempts such intrastate rates from the increases and preserves the customary "savings clause" (R. 119-120) that—

> "The foregoing findings relate to Utah intrastate rates generally ,and are without prejudice to reexamination, upon complaint or otherwise, as to the lawfulness of any individual Utah intrastate rate on any particular commodity."

To this date, neither the appellants nor any Utah shippers have availed themselves of the continuing opportunity extended by this "savings clause" for reex-

amination of the "lawfulness of any individual Utah intrastate rate." See *Wisconsin R. R. Comm. v. C., B. & Q. R. R. Co.*, 257 U. S. 563, at page 590-591; and *Florida v. United States*, 292 U. S. 1, at page 13.

II. APPELLANTS' QUESTION "(2)" IS SUPERFLUOUS, AND EMBRACES ERRONEOUS AND FALLACIOUS ASSUMPTIONS.

Appellants' statement of questions presented, both in their Jurisdictional Statement and in their brief, is confused and confusing. Their first question is whether the Commission's findings are supported by substantial evidence. Clearly, the Court's answer to that question, whether affirmative or negative, will resolve all aspects of the question whether the evidence is substantial and sufficient to suport the Commission's findings and order. Nevertheless, appellants state their second question as follows:

> "(2) May the court sustain the Interstate Commerce Commission's Order, without further evidence on the following:
>
> (a) The presumption that interstate and intrastate rates were in proper relationship prior to the increase;
>
> (b) The matter of common knowledge that intrastate and interstate traffic are intermingled on the same trains."

If the Court's answer to appellants' first question is in the affirmative, there will be no room for further inquiry concerning the substantiality and sufficiency of the evidence. If the Court's answer to appellants' first question is in the negative then obviously the Commission's order would be void and no further inquiry concerning any of appellants' other contentions would be necessary.

Argument in appellants' brief does not follow the pattern or outline of their questions as stated, but, as they seem to place emphasis and reliance upon discussions of subtopics "(a)" and "(b)" under their question "(2)", it is appropriate to analyze and point to the errors and fallacies implicit in those two subtopics.

Appellants' question "(2)(a)" is premised upon the proposition that, as a prerequisite to its order increasing the Utah intrastate rates, the Commission was required to make a determination or finding upon evidence that the interstate rates and the intrastate rates are not "in proper relationship."

But this misconceives the nature of the Commission's duty and of its function under Section 13(4) of the Act. There is no requirement in that statutory provision that the Commission first determine whether the interstate and intrastate rates are "in proper relationship" from the standpoint of their "reasonableness" as charges for transportation services performed under the respective sets of rates. The only determination required by the statute bearing upon the relationship between the interstate rates, which the Commission had found reasonable in Ex Parte 175, and intrastate rates is the finding that the intrastate rates cause either (a) undue advantage, preference or prejudice as between persons or localities in intrastate commerce against those in interstate commerce, or (b) undue or unjust discrimination against interstate commerce. The Commission made the latter finding in the instant case and it is upon that finding that the order rests, for the Commission held at page 104 of its report (R. 117) that the evidence was not sufficient to suport a statewide finding that the Utah intrastate rates caused undue preference and prejudice as between

persons and localities in interstate commerce, on the one hand, and in intrastate commerce on the other.

In *Florida v. United States*, 282 U. S. 194, this Court said at page 211:

> "As intrastate rates and the income from them must play a most important part in maintaining such a system, the effective operation of the Act requires that intrastate traffic should pay 'a fair proportionate share' of the cost of maintenance. And if there is interference with the accomplishment of the purpose of the Congress because of a disparity of intrastate rates as compared with interstate rates, the Commission is authorized to end the disparity by directly removing it. *Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy Railroad Company, supra; New York v. United States, supra* (pp. 585, 586)."

In that case, this Court pointed out at page 214 that authority to determine "the reasonableness *per se* of intrastate rates lay with the state authorities" and not with the Interstate Commerce Commission; that in dealing with unjust discrimination as between persons and localities in relation to interstate commerce, "the question is one of the relation of rates to each other," but that—

> "* * * [i]n considering the authority of the Commission to enter the state field and to change a scale of intrastate rates in the interest of the carrier's revenue, the question is that of the *relation of rates to income.*" (Italics added.)

In *United States v. Louisiana*, 290 U. S. 70, the Court held at page 79—

> "* * * [i]t sufficed that the Commission found that Louisiana showed nothing in the circumstances of its agriculture and industry or its traffic conditions so different from the rest of the country as to lead to

> the conclusion that the intrastate rates, raised to the reasonable general interstate level, would not themselves be reasonable; and that *it saved the rights of interested parties to test the reasonableness of any individual rate.*"

In finding in the instant case that, to remove the undue discrimination against interstate commerce the Utah intrastate rates should be increased to the level of the interstate rates the Commission finds that in certain instances the Utah intrastate rates "are now as high" as corresponding interstate rates, and it expressly provided (R. 119)—

> "* * * that increases may not be made in intrastate rates to levels higher than the interstate rates on like traffic to or from Utah for like or greater short-line distances over the same lines of railroad, except in instances where the interstate rates, and not the intrastate rates, are designated as published to meet motor-carrier competition."

In its finding "7" (R. 119), and in its order (R. 131), the Commission expressly excepted from the required increases the intrastate rates on a number of specified commodities.

Finally, the Commission here, as in *United States v. Louisiana,, supra,* and *Florida v. United States,* 292 U. S. 1, 13, "saved" the rights of appellants and other interested parties to test the reasonableness of any individual intrastate rate by expressly stating (R. 120) that its findings relate to Utah intrastate rates generally and—

> "* * * are without prejudice to reexamination upon complaint or otherwise, as to the lawfulness of any individual Utah intrastate rate on any particular commodity."

The Commission thus left appellants and other interested parties free, as it did in the *Florida* case just cited, to apply for modification of its order as to any specified intrastate rate on the ground that "it is not related to interstate rates in such a way as to contravene the provisions of the Interstate Commerce Act." Appellants have not availed themselves of that expressly reserved right, nor has any Utah intrastate shipper.

We submit that appellants may not be heard in the instant case to contend that any of the Utah intrastate rates are "unreasonable" or upon an unreasonably high level in relation to interstate rates. The question here is the "relation of rates to income," and *not* the "relation of rates to each other," *Florida v. United States*, 282 U. S. 194, 214.

Moreover, in one of its numerous decisions holding that Utah intrastate rates unduly discriminated against interstate commerce in violation of Section 13(4) of the Act, the Commission found in *Emergency Freight Charges Within Utah*, 213 I. C. C. 249, at page 250 that:

> "Prior to April 18, 1935 the intrastate rates within Utah generally were upon the same level as the interstate rates applying to and from that State."

So far as the record in the present case shows, the only change that has taken place in "the same level" then existing between the interstate rates and Utah intrastate rates has been the result of the Utah commission's refusal to authorize increases in intrastate rates commensurate with the several increases in interstate rates authorized by the Commission since its decision (December 9, 1935) in the case just quoted. (See history

of general increases authorized by the Commission, showing the refusal of the Utah commission to authorize similar increases [R. 434-442]; also recitals in the Commission's report in *Utah Intrastate Freight Rates and Charges*, 287 I. C. C. 315, at pages 317-320, describing the continued refusal of the Utah commission to permit intrastate rates in that state to be increased and maintained on "the same level" of interstate rates as increased in the several general increases authorized by the Commission.)

Thus, the "substantial disparity" between the interstate rates and the Utah intrastate rates which causes the unjust discrimination found by the Commission against interstate commerce in the instant case is the direct result of the Utah commission's refusal to permit "the same level" between the two sets of rates which existed prior to 1935, and its insistence upon maintaining Utah intrastate rates at a lower "level" than that which the Commission has found necessary for interstate rates in order to produce sufficient revenue to enable the railroads to provide an adequate and efficient national railroad transportation system. In *Illinois Commerce Comm'n v. U. S.*, 292 U. S. 474, at page 485, this Court held—

> "* * * [t]he effect of maintaining a lower rate, intrastate, than the reasonable interstate rate *is necessarily discriminatory* wherever the two classes of traffic, inextricably intermingled, are carried on, as in the District, under substantially the same conditions." (Italics added.)

Furthermore, until the instant case, the Utah commission has finally permitted (without an order of the Interstate Commerce Commission) increases in most of

its intrastate rates following each of the several Section 13 proceedings and findings by the Interstate Commerce Commission that the Utah rates unduly discriminated against interstate commerce. In so doing, the Utah commission has expressly given its approval to the increased intrastate rates and thus the intrastate rates were "made or imposed" by Utah state authority, *Florida v. United States*, 282 U. S. 194, 210.

It has long been settled that intrastate rates existing under or pursuant to state laws, whether prescribed or merely permitted to become effective, are presumed to be reasonable. *Chicago, Milwaukee, &c. R'y v. Tompkins*, 176 U. S. 167, 173 (rates made by South Dakota legislature); *Minneapolis and St. Louis R'd Co. v. Minnesota*, 186 U. S. 257, 264 (rates made by the Minnesota commission). In the latter case, this Court said at page 264, "[t]he presumption is that the rates fixed by the Commission are reasonable."

Appellants' question "(2)(b)" is whether the Court may sustain the Commission's order without further evidence on "[t]he matter of common knowledge that intrastate and interstate traffic are intermingled on the same trains." This concerns the sufficiency of the evidence on which Finding "1" is based.

We have set forth at some length the testimony of Witnesses Bradford and Jensen which amply supports that finding, ante pp. 37-43, and there pointed out that the positive testimony of these two long experienced railroad operating witnesses was not and is not disputed or contradicted by appellants or any other party of record. Indeed, appellants admit at pages 8-9 of their Jurisdictional Statement that this evidence establishes

"that the railroads handled interstate and intrastate freight in the same manner without distinction," but they immediately assert—

> "* * * [t]his, however, was not a matter that required any evidence. It is a matter of common knowledge to anyone who has the least knowledge about railroad operations. It is a matter which the Commission and the courts should and have taken judicial notice. To rely entirely on such state of facts to establish that 'all factors bearing on the reasonableness of the rate' are the same, ignores the all important element of density of traffic."

In other words, seeking a premise or basis for attacking the Commission's order, appellants baldly and falsely assert that what they admit to be established by the undisputed evidence of two experienced witnesses is "common knowledge." From this wholly false premise they next argue that the order is based not upon evidence but upon "common knowledge," and in this way they arrive at their conclusion that there is no evidence to support the Commission's finding "1" and that, therefore, the order is void. We submit that such completely irrational and fallacious process of attempting to destroy or evade the undisputed evidential basis for finding "1" and, thus, to establish a premise for attacking the Commission's order, must be summarily rejected. Whether intrastate and interstate traffic is intermingled and handled in the same trains without distinction by the railroads in Utah plainly is a question of fact to be established by evidence. That has been done in this case, as appellants have admitted, and the evidence admittedly establishing such facts may not be nullified or destroyed by appellants' bare assertion that the facts so established are matters of "common knowledge."

Having developed their false premise that the Commission's finding "1" is based upon "common knowledge", appellants then attack it by asserting that to rely upon "such state of facts" to establish that "'all factors bearing on the reasonableness of the rate' are the same, ignores the all important element of density of traffic."

In their Jurisdictional Statement, page 8, appellants quote from this Court's decision in *Illinois Commerce Comm'n v. U. S.*, 292 U. S. 474, at pages 483-484—

> "* * * [w]here the conditions under which interstate and intrastate traffic move are found to be substantially the same with respect to all factors bearing on the reasonableness of the rate and the two classes are shown to be intimately bound together, there is no occasion to deal with the reasonableness of the intrastate rates more specifically, or to separate intrastate and interstate costs and revenues. Compare *American Express Co. v. Caldwell*, 244 U. S. 617; *United States v. Louisiana, supra; Florida v. United States*, ante, p. 1."

Following that quotation appellants say—

> "The question here presented for determination is—What is meant by the term 'with respect to all factors bearing on the reasonableness of the rate'?"

Again, at page 13 of their Jurisdictional Statement, appellants say that to sustain the order increasing Utah intrastate rates the evidence must be sufficient to enable the Commission to find—

> "That all factors bearing upon the reasonableness of the rates are substantially the same as affecting interstate and intrastate rates."

Finally, at page 15 of their Jurisdictional Statement, appellants say that the duty is upon the appellees to

point out evidence of record showing "that all factors touching the reasonableness of rates are the same."

Confusing and incomprehensible as it is, we presume appellants' contention to be that before the Commission can order an increase in intrastate rates for revenue purposes and to remove undue discrimination against interstate commerce, it must have before it evidence showing that "all factors touching the reasonableness of the rates" are the same; that evidence admittedly justifying the following findings of the Commission is deficient in that it is not shown that such evidence covers "all factors", including "density of traffic", which have any bearing upon the "reasonableness" of the Utah intrastate rates—

> "For the most part, intrastate traffic handled within Utah and interstate traffic to or through points in that State are handled in the same trains by the same crews and other employees, and through the same yards and other facilities. No distinction is made between intrastate and interstate traffic in the loading, unloading, and line-haul movement." (R. 100.)

> "1. The conditions incident to the intrastate transportation of freight in Utah are not more favorable than those incident to the interstate transportation between Utah and adjoining States." (R. 118.)

But, as we have already shown (ante, pp. 63-65), appellants' fundamental error lies in their approach to and misconception of the Commission's function in dealing with intrastate rates under Section 13(4) of the Act. They seem to labor under the belief that before the Commission can order an increase in intrastate rates it must find each of such rates to be "reasonable." On the con-

trary, as pointed out by this Court in *United States v. Louisiana*, 290 U. S. 70, at pages 78-79—

"§13(4) does not in terms require the Commission to find that the intrastate rates which it prescribes are reasonable * * *"

"* * * the appellees insist that the order is defective because, in conforming the intrastate rates to the reasonable level of interstate rates, the Commission did not find specifically that in each case the rate as increased would be just and reasonable. But we think that the relationship of the section to §15a(2), already described, is such that the standard of reasonableness prescribed by the latter is that necessarily set up for § 13(4) which supplements it. * * * The administrative difficulties which would preclude performance of the duty imposed by §15a if the Commission were required to find that each individual rate prescribed is just and reasonable, would similarly prevent compliance with that under §13(4). * * * It sufficed that the Commission found that Louisiana showed nothing in the circumstances of its agriculture and industry or its traffic conditions so different from the rest of the country as to lead to the conclusion that the intrastate rates, raised to the reasonable general interstate level, would not themselves be reasonable; and that it saved the rights of interested parties to test the reasonableness of any individual rate.

In *Georgia Comm. v. United States*, 283 U. S. 765, this Court said at page 770—

"* * * [i]t is true that when state rates are assailed on the ground that they result in undue prejudice to interstate shippers or discriminate against interstate commerce, the Commission must determine whether the existing interstate rates are reasonable, as it may not require intrastate rates to be raised above a reasonable level. State Corporation

Comm. v. Aberdeen & Rockfish R. Co., 136 I. C. C. 173, 180. But the reasonableness of the interstate rates had already been found when they were established in the earlier stage of the proceedings; and at those hearings the Georgia Commission and the Highway Board were represented."

In the instant case, as in the *Georgia* case, the Commission had previously found in Ex Parte 175 that the interstate rates as there authorized to be increased were reasonable rates (284 I. C. C. 589, 661) and, again, in the instant case (297 I. C. C. 87, 105, R. 118) it found that—

"The amounts and percentages by which interstate freight rates and charges between points in Utah and points in other states were increased, as authorized in Ex Parte No. 175 are just and reasonable."

Having made the essential findings that the interstate rates as increased under Ex Parte 175 were reasonable for the purpose of providing additional revenue needed by the railroads for the purpose of the Act; that Utah intrastate rates were abnormally low and had not been increased to the level of the interstate rates found reasonable in Ex Parte 175; and the further finding, which appellants admit the evidence supports, that interstate and intrastate traffic in Utah are handled in the same trains, over the same rails, by the same crews, etc., it follows, as further found by the Commission, that conditions incident to intrastate transportation of freight in Utah "are not more favorable" than those incident to interstate transportation between Utah and adjoining states. From that series of findings upon evidence the ultimate conclusion that the Utah intrastate rates unduly burden and result in unjust discrimination against interstate commerce necessarily follows. As stated by

this Court in *Illinois Commerce Comm'n v. U. S.*, 292 U. S. 474, at page 485—

> "The effect of maintaining a lower rate, intrastate, than the reasonable interstate rate is necessarily discriminatory wherever the two classes of traffic, inextricably intermingled, are carried on, as in the District, under substantially the same conditions."

Appellants do not undertake to answer their own question as to what is meant by the words "all factors bearing on the reasonableness of the rate" as used by this Court in the *Illinois* case, *supra*. They seem to contend that the quoted words require evidence bearing upon each and every "factor" that could have any bearing upon the "reasonableness of the rate" and that since "density of traffic" has such bearing, the order in this case is void unless appellees can point out testimony of the railroads specifically showing that the density of traffic in Utah was less or no greater than the density of traffic elsewhere over the systems of the appellee railroads.

As we have already shown, the Commission's power over intrastate rates under Section 13(4), involves the question of the "relation of rates to income", and as held by this Court the Commission is not required in such cases to determine the "reasonableness" of the intrastate rates it orders to be increased (ante, pp. 63-65). However, to demonstrate the absurdity of such a rigid rule as appellants here insist upon, we remind the Court that there is a multitude of "factors" which have a bearing upon the reasonableness of rates. For example, in *Interstate Commerce Acts Annotated* (1929), Vol. 1, at pages 308-312, there are listed under the heading, "Gen-

eral Considerations as to Reasonableness and Justness of Charges," 659 "factors" having a bearing upon the reasonableness of rates in particular cases. Under "tests of reasonableness," there are listed 25 "factors" that have been given consideration by the Commission in adjudicating the reasonableness of rates in particular cases.

Some cases may present or involve very few, while other cases may involve many of these "factors" or "tests" bearing upon the reasonableness of rates. But since no two cases are identical and each case must be adjudicated upon its own facts, and no two cases involve the same "factors" or the same number of "factors" concerning the reasonableness of the rates, it is obvious that appellants have misunderstood the language quoted from this Court's decision in *Illinois Commerce Comm'n v. U. S., supra.* If the Commission must, as appellants suggest, have evidence before it and give consideration to all of the multitude of "factors" which it has heretofore found to have a bearing upon the reasonableness of rates in one or another of the literally thousands of cases decided by it, then it would clearly be impossible to present a case to the Commission for adjudication of the reasonableness of rates, for in no case would all of the multitude of "factors" be present, *United States v. Louisiana, supra,* 78-79.

While "density of traffic" does have a bearing in cases wherein the Commission is called upon to determine the "reasonableness" of a rate, which it is not here called upon to do, there is no provision in the Interstate Commerce Act nor any suggestion in any decision of any court or tribunal to the effect that the Commission cannot determine the reasonableness of a rate or order the

level of intrastate rates increased under Section 13(4) of the Act in the absence of evidence and a specific finding concerning the "density of traffic." Nor would the absence of evidence concerning "density of traffic", even in a case in which the Commission is called upon to determine the reasonableness of a rate, prevent the Commission from making such a determination, for "density of traffic" is only one out of the multitude of factors having a bearing upon the reasonableness of a rate, and with adequate evidence of other factors from which the Commission could make its determination, clearly its functions are not to be paralyzed merely because evidence bearing on one of the multitude of relevant factors is not present in a particular case.

III. THE COMMISSION DID NOT IGNORE EVIDENCE OF APPELLANTS OR OTHER PROTESTANTS; INSTEAD, AS SHOWN BY ITS REPORT, IT ANALYZED THEIR EVIDENCE AND FOUND IT DEFICIENT AND LACKING IN PROBATIVE FORCE.

Appellants' statement that the Commission *ignored* their testimony is not true, as we now demonstrate from the Commission's report.

1. The Utah commission contended that the 15.98 percent rate of return of the 37-mile Bamberger Railroad operating between Ogden and Salt Lake City, Utah, proved that all Utah railroads were faring well financially. The Commission rejected this as a ground for denying the increase in Utah intrastate rates, saying (R. 99-100)—

> "* * * [o]n brief, the Utah commission argues that the Bamberger's rate of return is a clear indication that carriers operating in Utah are faring well financially and that the comparatively low 3.82-percent return in 1953 of the five class I systems should not be attributed to the lack of the Ex Parte No.

175 increases on their Utah intrastate traffic. The Bamberger has no passenger operations,and it is the only railroad serving Hill Air Force Base. The seeming prosperity of the Bamberger does not prove that the other lines operating in Utah do not require additional revenue."

The Commission had rejected similar reasoning and contentions in Ex Parte 175, where it said (284 I. C. C. 610)—

"None of the deficit lines indicated, and none (other than certain conspicuous industry-affiliated lines) with earnings exceeding an 8-percent rate, are or have been important factors in controlling the general region- or country-wide basis of freight rates. We have long recognized—as did Congress in the Transportation Act of 1920, sec. 422—that even with a reasonable general basis of rates there must be some railroads that would have high, and some low, rates of return or none at all, and that in the interest of the commerce of the country neither the success of the most prosperous nor the unfortunate plight of the least favorably circumstanced lines could control in our determination of a wide basis of reasonable rates for application on lines of high, low, and average earning capacity. These roads perforce all must compete with each other for a large portion of the common body of available traffic, which must be carried at a common rate basis if the lines compete effectually. The great body of traffic is carried neither by the high earning nor low earning or deficit roads."

2. Analyzing and appraising evidence and contentions of the Utah Coal Operators Association, the Commission said (R. 102-103; 103-104)—

"The Utah Coal Operators Association is a nonprofit association representing the producers of

coal in the State. The association members produce more than 80 percent of the commercial coal mined in Utah. It opposes the application of the Ex Parte 175 increase. An exhibit filed by this association compares Utah intrastate rates with intrastate rates on coal in Montana, Wyoming, New Mexico, and Washington. *Such comparisons afford no adequate basis for a determination of the lawfulness, under section 13 of the Act, of the Utah intrastate rates.* In addition, the exhibit shows two instances in which the Utah intrastate rates are now on a higher basis, mile for mile, than interstate rates, the distances being fairly comparable:" (Italics added.)

* * * * * *

"The coal association also shows the following relation between rates on slack coal:

"From	To	Distance Miles	Rate	Ton-mile earnings Mills	Interstate Ex Parte No. 175 increase
Castle Gate, Utah	Ogden, Utah	152	$2.33	15.3	$2.61
Rock Springs, Wyo.	do	191	2.61	13.6	2.61
Castle Gate, Utah	Bushnell, Utah	171	2.59	15.1	2.90
Rock Springs, Wyo.	do	210	2.90	13.8	2.90

"Coal rates generally apply from groups, and *the foregoing comparisons are not representative of the group adjustment.* The Rock Springs-Kemmerer group in Wyoming is approximately 100 miles wide and the Castle Gate group in Utah is about 35 miles in extent. The rates from these two producing groups may reasonably be equalized to Ogden and to Bushnell, respectively.

"Evidence was also presented on behalf of the coal association to show that an increase in the intrastate rates on coal will result in an increased movement of this commodity by truck and in an increased use in Utah of natural gas and other fuels, with the result that the respondents' revenue from coal would be diminished, rather than increased.

We have given consideration to this evidence and are not convinced that the resultant traffic loss will result in decreased revenue on coal." (Italics added.)

3. Concerning efforts of Utah Citizens Rate Association (one of appellants here) to prove that Utah intrastate rates on iron and steel articles did not unduly discriminate against interstate commerce by comparing those Utah rates (*not* with interstate rates from and to Utah but) with *intrastate* rates on the same articles moving in California, the Commission said (R. 106)—

"On behalf of the Utah Citizens Rate Association, it is shown that from Kaiser, Calif., to Los Angeles, Calif., 46 miles, the rate on iron and steel bars, plates, shapes, and sheets is $1.96 a net ton, minimum 80,000 pounds including the Ex Parte No. 175 increase. From Pittsburg to San Francisco, Calif., 50 miles, the rates on the same articles are $2.76 a net ton, minimum 30,000 pounds, and $1.96, minimum 60,000 pounds, including the Ex Parte No. 175 increases. These rates are compared with rates on the same articles from Geneva to Salt Lake City, 38 miles, of $3.30 a net ton, minimum 40,000 pounds, and $3.11, minimum 80,000 pounds, not subject to the Ex Parte No. 175 increase. *The circumstances which motivated the establishment of the California intrastate rates are not revealed, and thus they bear slight relevance to the issue regarding the lawfulness of rates within Utah.*" (Italics added.)

4. With respect to evidence opposing further increases in Utah intrastate rates on ores and concentrates, the Commission said (R. 107-108)—

"The Utah Mining Association opposes any further increases in the Utah intrastate rates on ores and concentrates. Increases in supply, labor, ore-treatment, and transportation costs, and the volume

of imports in recent years, have created unfavorable economic conditions in the lead-zinc mining industry. The addition of the Ex Parte No. 175 increases to rates on the industry's intrastate traffic, the association urges, would add to the burdens at present being borne, serve to further restrict production, employment, profits, and exploration, and have the net effect of decreasing freight revenue from products of mines. The following table shows the number of lead-zinc mines operating in Utah during the years shown, classified by production tonnage:

Period	Total	Small 1-1,000 tons	Medium 1,000-10,000 tons	Large Above 10,000 tons
Year 1946.....	46	31	7	8
Year 1948.....	74	56	12	6
Year 1950.....	52	40	7	5
Year 1952.....	31	22	3	6
Year 1953.....	12	8	0	4

"*The association admits that the traffic in concentrates and metal in Utah and in the Western States generally moves principally in interstate commerce and now bears the Ex Parte 175 increases,* but it calls attention to the fact that any ore production lost through the intrastate application of Ex Parte No. 175 increases would also reduce the interstate movement of concentrates and metals." (Italics added.)

One cement company with a plant in Utah opposed and another cement company with a plant at Laramie, Wyo., supported the increases in Utah intrastate rates. Analyzing the evidence and discussing the situations of these two opposing shippers, the Commission said (R. 110-111)—

"There are two cement plants in Utah, one operated by the Ideal Cement Company at Devil's Slide, and the other by a competing producer at Salt Lake City. In 1948, a new mill was completed at Devil's Slide, which increased the annual production

capacity at that point from 700,000 to 2,200,000 barrels. The Ideal Cement Company has a warehouse or terminal at Salt Lake City. Distribution from this warehouse or terminal is wholly by truck to points in Utah and other States. The rates on cement, minimum 40,000 pounds, from Devil's Slide to Ogden, 32 miles, and Salt Lake City, 68 miles, are 8.5 cents and 12 cents, respectively. In order to meet truck competition, the railroads established rates, minimum 100,000 pounds, of 5 cents to Ogden and 6 cents to Salt Lake City, effective January 12, 1954, limited to expire on December 31, 1954, unless changed or extended.

"The Monolith Portland Midwest Company operates a cement plant at Laramie, 57 miles west of Cheyenne, Wyo., and 483 miles east of Ogden. From 1937 to 1945, this company shipped annually from Laramie to points in Utah an average of 1,640 tons (8,610 barrels) of cement, equivalent to 820 carloads of 40,000 pounds each. It has not shipped cement into Utah since 1948. The Monolith Company contends that the Utah intrastate rates on cement are unduly prejudicial to its plant at Laramie and give undue advantage to the cement mill at Devil's Slide. On June 30, 1946, the rates, minimum 40,000 pounds, to Salt Lake City were 34 cents from Laramie and 8 cents from Devil's Slide, making a rate difference of 26 cents. At present, the respective rates, minimum 40,000 pounds, are 55.2 cents and 12 cents, making a rate difference of 43.2 cents. This difference would be reduced by 1.8 cents to 41.4 cents if the 15-percent increase under Ex Parte No. 175 were applied to the intrastate rate from Devil's Slide to Salt Lake City. Special kinds of cement move for longer distances than from Laramie to Salt Lake City.

"It is urged on behalf of the Ideal Cement Company that an increase in intrastate rates on

cement from Devil's Slide will result in substantial diversion to motortrucks of the cement traffic presently moving by rail. *We are convinced on the record before us that the increases sought by respondents on cement will result in substantially increasing their revenue on this commodity, even though some of this traffic may be diverted to competing forms of transportation.*" (Italics added.)

5. After setting forth a tabulation (R. 113) comparing class and merchandise rates for comparable hauls to interstate and intrastate destinations, the Commission analyzed and discussed opposition testimony, as follows (R. 114)—

"The Utah Citizens Rate Association compares certain less-than-carload rates on specified commodities including paint, refrigerators, radio sets, drugs, hardware, and canned goods, from Salt Lake City to points in Utah with the merchandise rates on those commodities to points in Idaho and Wyoming for comparable hauls. Typical comparisons are listed below:

Commodity	From Salt Lake City to—	Distance Miles	L.c.l. rate Cents
Paint	Delta, Utah	135	93
Do	Pocatello, Idaho	170	90
Refrigerators	Thompson, Utah	217	220
Do	Rock Springs, Wyo	227	141
Radio Sets	Price, Utah	126	140
Do	Pocatello, Idaho	170	90
Drugs	Thompson, Utah	217	220
Do	Idaho Falls, Idaho	221	177

"Most points in Utah do not have merchandise rates due to the fact that motor competition is a compelling factor only in the northern part of the State. *The foregoing interstate merchandise rates do not reflect the full Ex Parte No. 175 increase because of truck-compelled reductions; no similar truck competition affects the intrastate rates shown, and*

the comparisons made are of unlike things." (Italics added.)

6. Under the heading, "*Evidence by the Utah commission,*" the Commission devotes two full pages to evidence introduced by the Utah commission (R. 114-117).

As stated by the Commission (R. 114-115), the Utah commission contended that certain factors affecting costs of the railroads handling Utah intrastate traffic were more favorable than corresponding systemwide factors. Concerning this evidence, the Commission said (R. 114-115)—

> "*Evidence by the Utah commission.*—Based on annual reports filed by four of the principal respondents with the Utah commission, it appears that the interstate freight-service *operating ratio* (freight-service expense divided by freight-service revenue) and the *intrastate density* (ton-miles per mile of main-line track) are as to each respondent more favorable than corresponding systemwide figures for 1953, as shown below:

1953	Intrastate	System
Denver & Rio Grande Western		
Freight operating ratio, percent	56.66	57.72
Density[1]	4,303,760	2,526,252
Southern Pacific		
Freight operating ratio, percent	46.71	66.00
Density[1]	12,703,072	3,798,280
Union Pacific		
Freight operating ratio, percent	55.23	62.17
Density[1]	5,148,461	3,474,790
Western Pacific		
Freight operating ratio, percent	51.72	61.38
Density[1]	3,745,726	3,408,515

1 Ton-miles per mile of main-line track.

"In preparing its annual report to the Utah commission, the Union Pacific follows certain rules, recommended by a convention resolution of the National Association of Railway Commissioners, for the determination of revenues and expenses allocable to each State. *The Union Pacific and the other respondents dispute the validity of the results obtained from the application of the formula. They assert that the reports do not reflect the actual cost of operation in Utah and therefore afford no basis for comparing operating costs. One of the principal objections to the density figures above shown is that they were obtained by using only the miles of main track. The density results would be substantially reduced if branch-line mileage were included. The comparisons thus made are of little significance in our determination here. A more important consideration is the positive showing made upon this record that the average unit expense of servicing Utah intrastate traffic is at least as great as that of servicing interstate traffic to and from Utah.*" (Italics added.)

As pointed out by the Commission in the language just quoted, both the "operating ratio" and the "density" figures were taken from the annual report of the railroads to the Utah commission, which *requires* that the reports be submitted in accordance with an arbitrary formula prescribed by the Utah commission "for the determination of revenues and expenses allocable to each State" through which the reporting railroad operates. The Utah railroads object to this arbitrary formula prescribed by the Utah commission as producing erroneous and misleading data. In submitting the data broken down as required by the Utah commission, the Union Pacific inserts the following statement and objection in each annual report to the Utah commission:—

"The company certifies to the correctness of the figures reported herein, *ascertained according to the formula as prescribed,* but in so doing it is not to be understood as admitting or approving the correctness of the formula, which does not in fact afford a basis for comparing operating costs in the different states, nor does the report reflect the actual cost of operation in the State of Utah." (R. 295; Italics added.)

Among the fatal deficiencies in the data submitted by the Utah commission (Exhibit 64, R. 548) is the fact that the so-called "operating ratios" shown disregard passenger revenues and expenses of the four railroads shown in the exhibit and reflect only freight revenues and expenses, so that the main objective of that evidence fails because it does not include revenues and expenses covering passenger service and losses incident thereto. See *King v. United States, supra,* pp. 260-267.

The so-called Utah traffic "density" figures are false because they divide the tonnage by the number of miles of *main line track* only, disregarding branch line mileage in Utah which, as stated by the Commission, makes the comparison "of little significance in our determination here". For example, the main line mileage of the Union Pacific in Utah is 452½ miles, while the branch line mileage in that State is 225½ miles, or about 50% of the total mileage of that company in Utah (R. 245). The Denver and Rio Grande also has considerable branch line mileage in Utah on which the traffic density is smaller than on the main line of that road (R. 320-321).

It is no answer to argue, as appellants do (Br. 31) that its operating ratio and density figures are valid because they disregard branch line mileage not only in

Utah but also throughout the systems of the four Utah roads. The record contains no evidence whatever to justify appellants' statement that main line and branch line mileage of the four roads are in approximately the same proportions in Utah and over their entire systems.

Among the defects which make the results produced by the controversial Utah formula misleading and incorrect is that it requires that Utah be credited with all transportation revenues derived from its intrastate traffic and in addition thereto revenues from interstate traffic are required to be apportioned to Utah on the basis of the mileage traversed in Utah by individual shipments or individual passengers. Revenues from sources other than transportation are required to be apportioned to Utah on the basis of the railroad mileage in that State compared to the total system miles. Operating expenses as required to be reported by the Utah commission represent the portion of the total operating expenses of the railroad resulting from apportionment on the basis of train mileage in Utah. Express revenue is required to be apportioned to Utah on the basis of express car-miles in Utah. Revenues from hauling United States mail are likewise required to be apportioned to Utah on a mileage basis (R. 305-307).

From the foregoing it is obvious that the intrastate statistics shown on Exhibit 64 are not intrastate in character and that the revenues and expenses of the four roads there shown are seriously distorted by the arbitrary inclusion of interstate transportation revenues on the basis of the mileage traversed in Utah by interstate shipments and by the arbitrary apportionment to Utah of other revenues, and the apportionment to Utah of a part of the system expenses on the basis

of train mileage in Utah. The figures there shown do not even purport to reflect actual costs or revenues and consequently they provide an entirely false basis for determining operating ratios and traffic density.

7. Evidence of the Utah commission purporting to show that railroad operations in Utah were more favorable than in Colorado or over the entire system of the Denver and Rio Grande was analyzed and discussed by the Commission and found lacking in probative force (R. 115-116)—

"The Utah commission also submitted an exhibit portraying various operating statistics of the Denver & Rio Grande Western in Utah, Colorado, and for the entire system. The data were taken from the railroad's annual reports filed with the two State commissions for 1952 and 1953, and purport to show that the carrier's operations in Utah are substantially more favorable than in Colorado or over the entire system. Except for a minor portion in New Mexico, the Denver & Rio Grande Western's trackage lies wholly in Utah and Colorado. Some of the principal comparisons for 1953 are listed below:

	Utah	Colorado	System
Tons per loaded freight car	34.65	30.74	32.32
Tons per train	1,774	1,394	1,530
Tons per locomotive	1,002	777	857
Tons per mile of track	4,303 760	1,979,776	2,526,252

"Evidence similar in nature was offered in *Kansas City Cham. of Com. v. Atchison, T. & S. F. Ry. Co.*, 164 I. C. C. 302, to show the favorable results of railroad operations in Kansas, and that the carriers serving Kansas were not in need of increased revenue. We observed therein, at page 308, and it is equally pertinent here, that the method of allocating revenues and expenses to a particular State was

open to so many serious objections that the results obtained were unreliable."

In the case cited in the last paragraph quoted above the Commission said—

"Evidence was introduced by the Kansas commission intended to prove the favorable results of railroad operations in Kansas; and that carriers serving Kansas are not in need of increased revenues. Similar evidence was considered in the *Western Trunk-Line case* and discussed in chapter E of the report therein. In general it may be said that the method of allocating to a particular State of revenues and expenses is open to so many serious objections that the results obtained are unreliable. Incongruous situations would be created if the rate levels in each State were determined alone upon, or controlled by, such statistical results." (Page 308.)

8. Testimony of the Utah commission purporting to show that the Utah railroads derive greater ton-mile revenue on intrastate traffic in that State than they derive from their interstate operations was analyzed, criticized and found by the Commission to lack probative effect (R. 116-117)—

"A study was submitted by the Utah commission based on this Commission's carload waybill statistics for 1952, showing the Utah intrastate ton-mile revenue as compared with the revenue per ton-mile on interstate shipments originated during that year, separated as to the principal commodity groups. These ton-mile figures are listed below:

Products	Revenue per ton-mile	
	Intrastate Cents	Interstate Cents
Agriculture	2.57	1.14
Animals	4.15	2.71
Mines	1.06	.74
Manufactured miscellaneous	3.63	1.52
Total of all products	1.21	1.06

"It is generally recognized that as the length of the haul increases, the revenue per ton-mile decreases. The foregoing intrastate ton-mile revenues are computed on traffic which moved for relatively short hauls, while the interstate revenues are based on relatively long hauls. Due to a marked difference in the length of haul as between intrastate and interstate traffic, *the comparisons thus made are not determinative of the issues before us.*" (Italics added.)

In view of this Court's invariable rule that the weight and probative force of evidence is for the Commission to determine in the exercise of its discretion and judgment and that "its findings of fact supported by substantial evidence are not subject to review", *Florida v. United States*, 292 U. S. 1, 12—a rule which the dissenting district judge obviously refused to follow in his criticisms of the Commission's treatment of the evidence (R. 50-65)—we submit that this Court will not substitute its judgment for that of the Commission upon the evidence submitted by the Utah railroads, nor with respect to the deficiencies, unreliable results and lack of probative force in the evidence submitted by the appellants and other parties protesting the increases before the Commission.

IV. APPELLANTS' CONTENTION THAT THE UTAH ORDER IS INVALID BECAUSE OF THEIR ASSERTION THAT THE COMMISSION'S ORDERS IN EX PARTE 175 AUTHORIZING A "FLAT HORIZONTAL PERCENTAGE INCREASE" RESULTED IN INTERSTATE RATES THAT "WERE NOT JUST AND REASONABLE BUT WERE UNJUST AND CONTRARY TO THE LAW," IS A COLLATERAL ATTACK UPON THE EX PARTE 175 ORDER, AND IS OTHERWISE UNTENABLE.

Appellants' question "(4)" is stated as follows in their Jurisdictional Statement, p. 3:

"May a collateral attack be made in this action upon the Interstate Commerce Commission Order in Ex Parte No. 175."

In their brief (page 5), in restating question "(4)", appellants omit the word "collateral" and add "upon the legality".

Appellants' complaint in the District Court alleges in XV(a) (R. 11), that the interstate rates resulting from the 15% increase permitted by the Commission in Ex Parte No. 175 were "contrary to the evidence and to the law in that said interstate rates as fixed by Ex Parte No. 175 were not just and reasonable but were unjust and contrary to the law, in that said Ex Parte No. 175 granted flat horizontal percentage increase on all freight rates with certain restrictive exceptions," in contravention of provisions of Sections 1(5) and 3(1) of the Interstate Commerce Act and that for that reason the instant order designed to bring Utah intrastate rates into conformity with such interstate rates "is beyond the power and authority of the Interstate Commerce Commission and contrary to law."

The District Court correctly rejected this contention, saying (R. 48-49) the orders in Ex Parte 175 are "not subject to collateral attack"; that whether interstate rates fixed by Ex Parte 175 were just and reasonable "is for the Commission, not the courts", and that the courts "have upheld flat horizontal percentage rate increases which contained a savings clause to prevent injustices."

In their efforts to escape or evade the District Court's holding on this point appellants now assert (Br. 36-37) that, while they agree with the general principle that decisions of the Commission "are not open to collateral attack," they are "not here attempting to set aside the interstate increases as authorized in Ex Parte 175, "but are merely attacking "the legality of that [Ex Parte 175]

order as it applies to these proceedings," and that, therefore, "this is not a collateral attack" on that order.

Surely, this is a "distinction without a difference." The Commission's action and nation-wide order in Ex Parte 175 is the "natural basis" for its Utah order, *King v. United States,* 344 U. S. 254, 272. Appellants' attempt to nullify the Utah order by attacking "the legality" of its "natural basis" is unquestionably a collateral attack upon the Ex Parte 175 order.

The settled rule is that a collateral attack may not be maintained against an order of the Commission and that any contention challenging the validity of a Commission order can be made only in a direct suit under Urgent Deficiencies Act (28 U. S. Code, Sections 1336, 1398, and 2284). *In Callanan Road Co. v. United States,* 345 U. S. 507, the appellant assailed the validity of a Commission order on the ground that an order previously issued by the Commission was invalid. The Court held at page 512 that the appellant "cannot in this collateral proceeding attack the validity" of the other order previously issued by the Commission, citing *S. E. C. v. Central Illinois Corp.,* 338 U. S. 96, 143; *Stanley v. Supervisors of Albany,* 121 U. S. 535, 550; *Reconstruction Finance Corp. v. Lightsey,* 185 F. 2d 167; *City of Tulsa v. Midland Valley R. Co.,* 168 F. 2d 252, 254; *Brown County, Tex. v. Atlantic Pipe Line Co.,* 91 F. 2d 394, 398. See also *Ill. Cent. R. R. Co. v. Public Utilities Comm.,* 245 U. S. 493, 502-503; *North Dakota v. Chicago & N. W. Ry. Co.,* 257 U. S. 485, 489; *Texas v. Interstate Com. Comm.,* 258 U. S. 158, 164; *Lambert Co. v. Balt. & Ohio R. R. Co.,* 258 U. S. 377, 382-383.

But, even if the forbidden collateral attack were maintainable, it is beyond this Court's power to de-

termine whether or not the interstate rates prescribed by the Commission in Ex Parte No. 175 were "just and reasonable", for that is an administrative question committed by Congress exclusively to the Interstate Commerce Commission, *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U. S. 426; *Interstate Comm. Comm. v. Ill. Cent. R. R.*, 215 U. S. 452, 470; *Manufacturers Ry. Co. v. United States*, 246 U. S. 457, 481-483; *Assigned Car Cases*, 274 U. S. 564, 581; *Swayne & Hoyt, Ltd. v. U. S.*, 300 U. S. 297, 303-304; and *Montana-Dakota Co. v. Pub. Serv. Co.*, 341 U. S. 246, in which this Court held at pages 251-252:

> "Petitioner cannot separate what Congress has joined together. It cannot litigate in a judicial forum its general right to a reasonable rate, ignoring the qualification that it shall be made specific only by exercise of the Commission's judgment, in which there is some considerable element of discretion. It can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission and not even a court can authorize commerce in the commodity on other terms.
>
> "We hold that the right to a reasonable rate is the right to the rate which the Commission files or fixes, and that, except for review of the Commission's orders, the courts can assume no right to a different one on the ground that, in its opinion, it is the only or the more reasonable one."

The power of the Commission, challenged by appellants, to authorize a "flat horizontal percentage increase on all freight rates" without determining whether each and every one of the multitude of individual rates is lawful under the standards of Section 1(5) or Section 3(1) of the Act, has been sustained by the courts for

more than 50 years. In *New England Divisions Case*, 261 U. S. 184, the Court held at pages 197-198:

> "For many years before the enactment of Transportation Act, 1920, it had been necessary, from time to time, to adjudicate comprehensively upon substantially all rates in a large territory. When such rate changes were applied for, the Commission made them by a single order; and, in large part, on evidence deemed typical of the whole rate structure. This remained a common practice after the burden of proof to show that a proposed increase of any rate was reasonable had been declared, by Act of June 18, 1910, c. 309, § 12, 36 Stat. 539, 551, 552, to be upon the carriers. Thus, the practice did not have its origin in the group system of rate-making provided for in 1920 by the new § 15a. It was the actual necessities of procedure and administration which had led to the adoption of that method, in passing upon the reasonableness of proposed rate increases."

In a footnote on page 198 the Court cited numerous proceedings in which the Commission from its early days had adopted the "percentage" method of increasing rates to produce additional revenue needed by the carriers. The footnote is as follows:

> "*Advances in Rates—Eastern Case*, 20 I. C. C. 243, 248; *Railroad Commission of Texas v. Atchison, Topeka & Santa Fe Ry. Co.*, 20 I. C. C. 463, 484; *Five Per Cent. Case*, 31 I. C. C. 351, 402, 403, 448, 449, *1915 Western Rate Advance Case*, 35 I. C. C. 497; *Western Passenger Fares*, 37 I. C. C. 1; *Fifteen Per Cent. Case*, 45 I. C. C. 303. See also the successive orders issued in the Shreveport controversy, 23 I. C. C. 31; 34 I. C. C. 472; 41 I. C. C. 83; 43 I. C. C. 45; 48 I. C. C. 312. Compare *Houston East & West Texas Ry. Co. v. United States*, 234 U. S. 342, 349; *Eastern Texas R. R. Co. v.*

Railroad Commission of Texas, 242 Fed. 300; *Looney v. Eastern Texas R. R. Co.*, 247 U. S. 214; also *Illinois Central R. R. Co. v. State Public Utilities Commission*, 245 U. S. 493, with *Business Men's League of St. Louis v. Atchison, Topeka & Santa Fe Ry. Co.*, 41 I. C. C. 13, 503, and 49 I. C. C. 713. The Commission has, since 1920, also reduced rates in broad group proceedings upon consideration of typical conditions throughout the entire region involved in the reduction. *Reduced Rates, 1922*, 68 I. C. C. 676; *Rates on Grain, etc.*, 64 I. C. C. 85. Referring to the latter case the Commission said in their second report in this case (66 I. C. C. 203), 'In all such general rate cases we have realized and have held that if we were required to consider the justness and reasonableness of each individual rate, the law would in effect be nullified and the Commission reduced to a state of administrative paralysis.'"

In *United States v. Louisiana*, 290 U. S. 70, the Commission had in the *Fifteen Per Cent Case: 1931*, authorized increases in interstate rates which it later used as a basis for ordering Louisiana intrastate rates increased under Section 13(4) of the Act. In rejecting the contention that the Commission's order raising interstate rates was invalid because it did not find that each of the interstate rates resulting from such increase would be just and reasonable, this Court reviewed the purpose of the Act to develop and maintain an adequate national transportation system and held at pages 75-76:

"As pointed out in the reports of the Commission in this case and others (see Increased Rates, 1920, 58 I. C. C. 220; New York Passenger Fares, 59 I. C. C. 290), § 15a, by its terms, commands the Commission, in providing the required revenue by in-

creasing rates, to deal with the carriers of the nation as a whole or in broad classes, and as this Court recognized in the *New England Divisions Case, Supra,* 197, 198, this requirement would be nullified and the admini rative arm of the Commission paralyzed, if instead of adjudicating upon the rates in a large territory on evidence deemed typical of the whole rate structure, it were obliged to consider the reasonableness of each individual rate before carrying into effect the necessary increased schedule."

In support of their argument that the Commission's order in Ex Parte No. 175 is invalid, appellants cite (Br. 37) Section 15a(2) of the Act *as enacted in 1920.* The cited provisions, however, were repealed by Emergency Railroad Transportation Act, 1933, 48 Stat. L. 211, 220. The present Section 15a(2) reads as follows:

"In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service."

Appellants' assert that neither the railroads nor the Commission has in Ex Parte No. 175 or in other general rate increase cases given consideration to—

"* * * efficiency and economy of the management of the roads. Such situation has merely been presumed to exist." (App. Br. 37)

This collateral attack upon the proceedings in Ex Parte No. 175 and other general rate increase proceedings con-

ducted by the Commission is necessarily baseless and completely without factual or evidential foundation. If appellants desired to challenge the validity of those Commission proceedings upon the ground asserted "[a] direct attack in such circumstances was the remedy", *Callanan Road Co. v. United States*, 345 U. S. 507, 512. Moreover, in its first decision in Ex Parte No. 175, *Increased Freight Rates, 1951*, 280 I. C. C. 179, at pages 188-189, the Commission finds—

> "Upon the record we conclude and find that, to enable the petitioning and intervening carriers, including freight forwarders, *under honest, economical and efficient management*, to provide adequate transportation service to meet the needs of commerce, the postal service, and the national defense and specifically to meet increases in the costs of materials and supplies and the increased wages of their employees, both at present effective and impending, including the increased wages under an agreement (see apendix) entered into with nonoperating employees and called to our attention at the oral argument, of which we take official notice, the basic freight rates and charges of such petitioning and intervening carriers *may be justly and reasonably increased*, until the further order of the Commission, as hereinafter specified." (Italics added.)

In the instant case, the Commission's report summarizes (R. 99) evidence taken from the railroads' Exhibit 2 demonstrating the increase in operating efficiency and economy of Class I railroads serving Utah. There is no justification for baseless assertions by appellants that the Commission proceeded in this or any other case upon "unwarranted presumptions" or "matters of common knowledge" or upon "the fiction that substantial evidence exists where obviously none does" (App. Br. 43).

Under the heading, "State Authority v. Federal Authority", appellants express their alarm over the effect of the Commission's exercise of its powers under Section 13(4) of the Act upon the soverign power of the State of Utah to regulate intrastate rates. The last sentence in their Jurisdictional Statement (p. 16) reads—

> "If the power of the states to regulate intrastate rates is in fact dead, then it should be buried."

Similar and equally dramatic assertions were made in the first case reviewed by this Court involving the Commission's exercise of its powers under Section 13(4), *Wisconsin R. R. Comm. v. C., B. & Q. R. R. Co.*, 257 U. S. 563. At pages 590-591, the Court answered by saying—

> "It is said that our conclusion gives the Commission unified control of interstate and intrastate commerce. It is only unified to the extent of maintaining efficient regulation of interstate commerce under the paramount power of Congress. *It does not involve general regulation of intrastate commerce.* Action of the Interstate Commerce Commission in this regard should be directed to substantial disparity which operates as a real discrimination against, and obstruction to, interstate commerce, and must leave appropriate discretion to the state authorities to deal with intrastate rates as between themselves *on the general level* which the Interstate Commerce Commission has found to be fair to interstate commerce." (Italics added.)

The substantial disparity between the Utah intrastate rates and the interstate rates operates as a "real discrimination against, and obstruction to, interstate commerce," amounting to more than $1,800,000 annually. Having flatly refused to co-operate to any extent whatever in alleviating this discrimination to the end that the purpose of Congress to so adjust rates as to provide

an adequate national railroad transportation system might be realized, and having similarly refused to cooperate in other cases mentioned in the Commission's report in the instant case, it comes with poor grace, or none, and much too late, for the Utah commission now to complain of federal invasion of Utah's control over its intrastate rates.

CONCLUSION

The decree of the District Court dismissing the complaint should be affirmed.

Respectfully submitted,

ELMER B. COLLINS,
Counsel of Record for Railroad Appellees,
1416 Dodge Street,
Omaha, Nebraska.

BRYAN P. LEVERICH,
ERNEST P. PORTER,
ALBERT R. BOWEN,
PETER W. BILLINGS,
WOOD R. WORSLEY,
S. N. CORNWALL,
A. U. MINER,
Attorneys for Railroad Appellees.

November, 1957.

PROOF OF SERVICE

I, ELMER B. COLLINS, counsel of record for railroad appellees herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 6th day of November, 1957, I served, on behalf of all railroad appellees herein, copies of the foregoing brief on the adverse parties herein, as follows:

1. On the Public Service Commission of Utah by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

E. R. Callister, Esq.
Attorney General of Utah
Salt Lake City, Utah

Keith Sohm, Esq.
Commerce Attorney for Utah Public Service Commission
State Capitol
Salt Lake City, Utah

2. On the Utah Citizens Rate Association by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Calvin L. Rampton, Esq.
721 Continental Bank Bilding
Salt Lake City, Utah

3. Also on the United States of America by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Honorable J. Lee Rankin
Solicitor General of the United States
Department of Justice
Washington 25, D. C.

Victor R. Hansen, Esq.
Assistant Attorney General
Department of Justice
Washington 25, D. C.

A. Pratt Kesler, Esq.
United States Attorney for the District of Utah
Room 200 Federal Building
Salt Lake City, Utah

4. Also on the Interstate Commerce Commission by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Robert W. Ginnane, Esq.
General Counsel
Interstate Commerce Commission
Washington 25, D. C.

ELMER B. COLLINS,
Counsel of Record for Railroad Appellees.

APPENDIX A

The Pertinent Provisions of the Interstate Commerce Act (United States Code, Title 49), Involved in This Case Are as Follows:

National Transportation Policy—

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several states and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions; —all to the end of developing, coordinating and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

Section 13(3)—

"Whenever in any investigation under the provisions of this part, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation or practice, made or imposed by authority of any State, or initiated by the President during the period

of Federal control, the Commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this part or part III with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the Commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matters wherein the Commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the Commission. The Commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision of this part or part III."

Section 13(4)—

"Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares,

charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding."

Section 15a(2)—

"In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service."

APPENDIX B

Ex Parte 74—

Increased Rates, 1920, 58 I C. C. 220; 58 I. C. C. 302

Utah Rates, Fares and Charges, 60 I. C. C. 388 (Feb. 1921)

Ex Parte 103—

Fifteen Per Cent Case, 1931, 178 I. C. C. 539; 179 I. C. C. 215

Increases in Intrastate Rates, 186 I. C. C. 615—Utah, p. 660 (Sept. 29, 1932)

Ex Parte 115—

Emergency Freight Charges, 1935 (March), 208 I. C. C. 4

Emergency Freight Charges Within Utah, 213 I. C. C. 249 (Dec. 1935)

Ex Parte 123—

Fifteen Per Cent Case, 1937-1938, 226 I. C. C. 41

(Utah commission authorized increases on some commodities—no 13th Section case filed.)

Ex Parte 148—

Increased Railway Rates, Fares and Charges, 1942 (March), 248 I. C. C. 545

Increases in Utah Freight Rates and Charges, 255 I. C. C. 97 (Jan. 11, 1943)

Ex Parte 162—

Increased Railway Rates, Fares and Charges, 1946 (Dec. 5), 266 I. C. C. 537

(Utah commission authorized increases only in part.)

Ex Parte 166—

Increased Freight Rates, 1947 (Oct. 6), 269 I. C. C. 33

(Utah commission authorized increases only in part.)

Ex Parte 168—

Increased Freight Rates, 1948 (Dec. 29), 272 I. C. C. 695

(Utah commission denied increases entirely, stating that railroads failed to show whether "the revenues from Utah intrastate traffic produce a fair return on that portion of the investment used on Utah intrastate traffic", and that it could not determine whether revenues from Utah intrastate traffic were inadequate "unless and until the carriers proved that fact by evidence segregating the expenses incurred in transporting Utah intrastate traffic and comparing them with the revenues derived therefrom" 287 I. C. C. 315, 320.

In *Utah Intrastate Freight Rates and Charges,* 287 I. C. C. 315 (Dec. 1, 1952), the Interstate Commerce Commssion authorized increases in Utah intrastate rates reflecting increases authorized by that commission in Ex Parte Nos. 162, 166 and 168 for interstate application but refused in part by the Utah commission. These increases were not permitted by the Utah commission on intrastate traffic until May 1, 1953, or a year after authorization by the Interstate Commerce Commission in Ex Parte 175.

Ex Parte 175—

Increased Freight Rates, 1951, 280 I. C. C. 179, 281 I. C. C. 557, 284 I. C. C. 589

Utah Intrastate Freight Rates and Charges, 297 I. C. C. 87 (Oct. 17, 1955)